

**University of Cape Town**

School of Advanced Legal Studies

And

Commercial Law Department

**A comparison of the South African and Swaziland's labour market regulatory systems in dispute resolution**

by

**Bongani Sydney Dlamini**

Research dissertation presented for the approval of Senate in partial fulfillment of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses

Supervisor : Professor E.R Kalula

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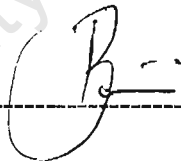
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### DECLARATION ON PLAGIARISM

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.
2. Each contribution to, and quotation in this essay from the works of other people has been acknowledged and has been cited and referenced.
3. This essay is my own work.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature

A handwritten signature in black ink, appearing to be 'B. J.', is written over a horizontal dashed line.

## ACKNOWLEDGEMENTS

I wish to convey my sincere appreciation to my supervisor, Professor Evance Kalula for the invaluable assistance in terms of reading, advising and correcting me in the writing of this academic paper.

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I also thank my family in Swaziland, who at first could not understand my decision of having to leave my full time job to again become a full time student and for taking care of my siblings in my temporal absence.

Lastly I thank the almighty God for the privilege of allowing me to advance on my studies and making me understand all the important issues in class.

## **ABSTRACT**

*The choice of a labour market regulatory system in any given social context is crucial for the economic development of that country. In South Africa, a challenge has been made to the key players in the labour environment to choose whether the primary focus should be on creating better jobs or whether the main challenge should be in creating many or more jobs (Baskin: 2004). These two conflicting interests, though almost intertwined to each other, are however standing on a separate footing. Of late in South Africa, there have been cries for an urgent need to deregulate the labour market in the quest to create more jobs and free the small and medium businesses to participate in the economy without stringent measures. Concern has been raised about the unavailability of jobs for the people of South Africa. The major challenge facing the Government is the need to create more jobs.*

*In Swaziland, the problem of job scarcity is reaching a crisis level. A large section of the economically active population is unemployed. Previously, Swaziland was considered to be an ideal place to conduct business by many enterprises in Southern Africa. The new political dispensation in South Africa and the political stability in Mozambique have brought about a sudden and devastating effect on Swaziland. Businesses are closing down operations and very few enterprises are showing an interest to invest in that country.*

*This notwithstanding, Swaziland has opted to use South Africa's system of labour market regulation. The essence of the paper will be to examine the choice of the labour market regulatory systems between these two countries and to try to establish the successes and failures of each system in its given context. The main focus will be on the dispute resolution mechanism that each system adopts and whether such system works well given the cultural, social, economic and political dispensation of that country. The institutions that will be discussed are the Commission for Conciliation, Mediation and Arbitration (CCMA), the Conciliation, Mediation and Arbitration Commission (CMAC), the Labour Court and the Industrial Court.*

*At a later stage, the discussion takes a twist and focuses on the competing and overlapping jurisdiction between the labour dispute resolution systems as set out in labour legislations on the one hand, and the common law power of the High Courts to decide on labour related matters on the other hand. The idea is to shed some light on the difficulties that may arise if the jurisdictional problems are not resolved and that this may in turn impact negatively on the labour market regulatory systems.*



## 1. Introduction

The paper seeks to critically compare the labour market regulation systems between Swaziland and South Africa. It focuses on the processes of mediation, arbitration and adjudication between the two countries. Its aim is to identify the strengths and weaknesses of the two systems in a comparative manner. In this regard, attention is drawn to the fact that the labour environment is influenced by external factors which help to model and fashion labour regulation in a particular way. These factors include, among others, the political and economic conditions in a particular social context, the general social patterns in a country and the role of the global community, which not only seeks to set minimum labour standards, but also creating competition among nations to establish labour regulatory systems that are flexible.

The discussion is set in motion by an examination of the compelling, yet contrasting views of Professor Kahn- Freund and Professor Watson on the use of foreign systems of law. The aim is to find a basis or approach for analyzing and contextualizing the main issues that arise in the discussion. Of particular interest is the fact that other than the use of the Roman-Dutch system of law, Swaziland tends to assimilate South Africa in every respect in so far as the structure and substance of the legal system is concerned. Overall, this has worked well for Swaziland but in other respects the results have not been too good.

The next step comprises an attempt to compare, in general terms, the historical, social, political and economic patterns between the two countries. Again there are issues that may be regarded as working to the advantage of Swaziland in assimilating South Africa's legal system, particularly when one has regard to the issues of historical and cultural

similarity. However, the other considerations may well be working against the notion of Swaziland having to use South Africa's system of law. Businesses look for a market to sell their finished products. With a population of 1 million people compared to South Africa's 44 million, should Swaziland be adopting the same system of labour regulation in its quest to create more job opportunities and on its attempt to attract more investors? A further consideration in this regard relates to the political dispensation between the two countries. Political stability is a key consideration in any given regulatory system. The political systems between the two countries differ in significant terms and this can only influence Swaziland labour regulatory system in either a positive or negative manner.

The discussion then focuses on principles of substance relating to the role of the conciliation, arbitration and adjudication structures. Reference is made to the current legal provisions between the two systems with case law quoted where relevant. In the final analysis the paper makes a comparison between the two systems and makes an attempt to establish a system that works better in a given scenario.

## **2. A theoretical approach on the viability of using a foreign legal system**

Writing about the South African position, Professor Clive Thompson<sup>1</sup> made reference to the idea of "borrowing and bending" and considered whether South Africa could have benefited from such a system. According to Thompson, "[t]he borrowing and grafting process has featured prominently in the legal revolution and, while not unproblematic, has in the circumstances delivered a reasonably coherent jurisprudence."

Professor Kahn-Freund<sup>2</sup> on the other hand wrote about comparative law as a subject that can be used as a tool for bringing about law reform, as opposed to comparative law being used as a tool for research.<sup>3</sup> The following questions, which will be critical in this discussion were raised by Kahn-Freund in his paper: "What are the uses and what are the misuses of foreign models in the process of law making? What conditions must be

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<sup>1</sup> 'borrowing and bending: the development of South Africa's Unfair Labour Practice jurisprudence' (1993) 6, 3 *International Journal of Comparative Law and Industrial Relations* 183

<sup>2</sup> 'On Uses and Misuses of Comparative Law' 1974 *Modern Law Review* 1

<sup>3</sup> At p.2

fulfilled in order to make it desirable or even to make it possible for those who prepare new legislation to avail themselves of rules or institutions developed in foreign countries?”<sup>4</sup>

According to Kahn-Freund the use of foreign legal systems is usually resorted to in order to achieve either one or all of the three main goals namely:

- (a) to prepare a globally shared system of law
- (b) to give adequate legal effect to a social change shared by the foreign country to the borrowing country
- (c) to promote a social change through the use of the foreign system of law.<sup>5</sup>

In the view of Kahn-Freund, successful borrowing of a foreign legal system is not possible, save in exceptional and limited circumstances. In order to find support for his approach, Kahn-Freund referred to Montequieu’s opinion to the effect that environmental factors inhibit successful borrowing from one institution to another in that such environment factors tend to influence political decisions in a particular direction. Finding footage on Montequieu’s views, Kahn-Freund introduces the element of political differentiation which, according to him is as obvious as the differences in cultural and social integration.<sup>6</sup> Of interest is the first element, namely the cultural difference which Professor Kahn-Freund describes as the “gulf between the communist and the non-communist world, and that between dictatorships and democracies in the capitalist world.”<sup>7</sup> Elaborating on the features of this element, it is stated by Kahn-Freund that :

“The ways people earn their living may be similar, but not the role played by pressure groups such as independent trade unions and employers’ associations.

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<sup>4</sup> At pp 1-2

<sup>5</sup> At p.3

<sup>6</sup> At p.6

<sup>7</sup> At p.6

problems such as those of housing, of town planning, of pollution may be no different in Russia or Spain or South Africa from what they are in this country or in the United States, but the procedure of arriving at a solution, the form of discussion, the role of the individual in that discussion are different. In all the concerns the organization of the law-making and decision-making power and the relation between self-governing social groups and the official apparatus of the State a wall has been erected which is far more effective in our time than any of the environmental criteria mentioned by Montequieu.”<sup>8</sup>

The rules which organize constitutional, legislative, administrative or judicial institutions are the ones which are more resistant to transplantation. A simple example of this fact is the failed attempt to export the British Parliamentary system into countries with a different historical background, social structures and political dispensation from that of the British empire.<sup>9</sup> In the sphere of labour relations, Kahn-Freund contends that this is one area in which there is a need to set up international standards and transplant systems from more to less developed countries. In this regard, the role of the International Labour Organisation comes to the forefront. It is within the operational framework of this organization that the comparative method is best demonstrated as this international instrument sets out to introduce uniform and/or minimum standards in the area of labour relations.<sup>10</sup> It is to be noted however that the link between the political constitution of a country and the distribution of decision making power applies in this area of the law with an even a greater force.<sup>11</sup> The explanation for this state of affairs is perhaps to be found in the fact that labour relations is essentially about power struggle between the parties in the tripartite forum.

According to Kahn-Freund, the implementation of a foreign legal system is more flexible in the area of individual labour law as opposed to collective labour law.<sup>12</sup> In the words of the author, “standards of protection and rules on substantive terms of employment can be

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<sup>8</sup> At p.11

<sup>9</sup> At p.17

<sup>10</sup> *ibid*, at p.20

<sup>11</sup> *ibid*, at p.21

<sup>12</sup> *ibid*, at p.21

imitated-rules on collective bargaining on the closed shop, on trade unions, on strikes, cannot.” To demonstrate the difficulty presented by the latter system of law, the framers of the ILO Convention and the European Charter opted not to require strict adherence thereto by member states but rather opted to use flexible language such as promoting collective bargaining by implementing “measures appropriate to national conditions and that the principles of the Convention and Charter were to apply only “where necessary”<sup>13</sup>

Kahn-Freund’s views are met with resistance by Watson,<sup>14</sup> who contends that successful borrowing of a foreign legal system can be undertaken no matter how different the social or political situation may be or no matter how different the level of development between the two systems can be.<sup>15</sup> According to Watson, what the transformer should be looking at is an idea that can be successfully transplanted in his [her] own country. This does not require a systematic knowledge of the law or political structure of the donor country even though knowledge of such would be an advantage<sup>16</sup>. Watson’s theory suggests that successful borrowing can be achieved even when nothing was known of the social, political or economic systems of that foreign law. Watson expands on his theory by writing that legal rules can be adopted from a system which is much more politically or economically developed. In this regard Watson states that, “however historically conditioned their origins might be, rules of private law in their continuing life time have no inherent close relationship with a particular people, time or place.”<sup>17</sup> In contrast to Kahn-Freund’s view, Watson observes that the degree to which any rule can be borrowed depends on how close it is with the foreign power structure and that the successful use of the foreign law requires knowledge not only of the foreign law also the political context within which it operates<sup>18</sup>.

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<sup>13</sup> *ibid*, at p.22

<sup>14</sup> ‘Legal Transplants and law reform’ (1976) 92 Law Quarterly Review 79

<sup>15</sup> at p.79

<sup>16</sup> at p.79

<sup>17</sup> At p.79

<sup>18</sup> at p.81

### 3. A socio-economic and political conditions of South Africa and Swaziland

The views expressed by Watson and Kahn-Freund will be assessed in the context of the success or otherwise of the dispute resolution models between South Africa and Swaziland as regards the conciliation, arbitration and adjudication systems of the two countries, and also the competing jurisdictional powers between the labour court and the High Court in these countries. The comparison will commence with a brief outline of the historical, social, geographical, political and economic background of the two countries before paying particular attention on the dispute resolution structures of these countries and whether these have been successful in their quest for labour peace and harmony.

Save for the native language used in Swaziland, namely SiSwati, which is included in South Africa's Constitution of 1996 as one of the eleven official languages<sup>19</sup> the two countries differ significantly in terms of historical background, social structures, political and economic systems and geographical location. Swaziland's political head is King Mswati III who rules side by side with the Queen Mother.<sup>20</sup> In accordance with the 1973 Decree, the King is the chief political figure in whom all legislative, judicial and Executive power lies. Prior to this period, Swaziland was ruled by means of a constitution which had been adopted immediately after gaining independence. It is not known as to what might have led to the then King Sobhuza II to abolish the constitution or in what way the constitution was regarded as being "unsuitable" for the Swazi people, but the case of *Thomas Bhekindlela Ngwenya v. The Deputy Prime Minister*<sup>21</sup> could have played an important influence in the repeal of the constitution.

The applicant, Ngwenya, was a vocal political activist who spoke strongly against the rulers of the day in Swaziland. During the election of Members of the House of Assembly, the applicant had been nominated and won such elections. On the 25 May 1972 having won such elections, the applicant was served with a deportation order and

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<sup>19</sup> Section 6(1) of the Constitution

<sup>20</sup> Queen Regent Dzeliwe Tfwala

<sup>21</sup> 1970-1976 SLR 119

was actually deported to the Republic of South Africa. The applicant had then applied to the High Court for an order in the following terms:

- a) Setting aside the declaration by the 1<sup>st</sup> Respondent (Deputy Prime Minister) that applicant was a prohibited immigrant
- b) Declaring that applicant was a person belonging to Swaziland.

The High Court granted the orders sought by the applicant on the 29 August 1972. The 1<sup>st</sup> respondent (Government) appealed to the Court of Appeal against the decision given by the High Court. Whilst the matter was pending in court, Parliament enacted a legislation on the 14 November 1972 (the Amendment Act) in which was introduced a new s10 *bis* which provided that :

- “(1) There is hereby established a Special Tribunal consisting of five persons to be appointed by the Minister...
- (2) In the event of any doubt as to whether or not a person belongs to Swaziland in terms of s 10(a), the issue shall be referred to such Special Tribunal for its decision by such person or the Chef Immigration Officer or the Permanent Secretary of the of the Deputy Prime Minister, which shall have sole jurisdiction to adjudicate such issue.
- (4) Any person affected by the decision of such Special Tribunal may by written notice lodge with the Prime Minister ...an appeal to the Prime Minister against such decision, and the decision of the Prime Minister on such appeal shall be final.
- (6) No decision of such Special Tribunal given in terms of subsection (2) or of the Prime Minister on appeal in terms of subsection (4) shall be subject to any appeal to any court.
- (7) Such Special Tribunal shall be entitled to hear and adjudicate upon the matter

referred to it under subsection (2) notwithstanding any judgement, decision or order previously made by any authority, tribunal or court on or in connection with any issue as to whether or not such person belongs to Swaziland in terms of section 10(a).

- (8) Any decision made under subsection (2) by the Special Tribunal or any decision made by the Prime Minister under subsection (4), as the case may be, shall be deemed to supersede and render any such previous judgement, decision or order as referred to in subsection (7) of no force and effect.”

The applicant instituted another application in the High Court to have this amendment set aside since he did not wish to appear before the Special Tribunal. His application before the then Chief Justice Hill was unsuccessful. An appeal was lodged on his behalf to the Appeal Court, which court on hearing the case instantly allowed the appeal. In deciding the appeal the court made reference to s134 of the Constitution which dealt with the procedure of altering the Constitution especially with regards to the “entrenched” and “especially entrenched” clauses. The court noted that this procedure was not followed in effecting the amendment to the Immigration Act as same was effected in the ordinary bicameral way. The second issue involved the circumstances under which the court’s powers could be ousted by legislation. The appellant argued that the Constitution protects the rights of Swazi citizens and expressly or impliedly gives the High Court jurisdiction to decide whether or not such rights have been infringed. The argument was that legislative interference with such express or implied jurisdiction of the High Court would be an alteration of the Constitution, also requiring a joint sitting. S 56 of the Constitution provided that “the High Court shall have jurisdiction to hear and determine any question whether –

- (c) any person has been validly elected as an elected member of the House...”



On the other hand, s 51 (1) provided that "... a person shall be qualified to be registered as a voter for the purpose of elections of elected members of the House of assembly if, and shall not be so qualified unless, he...is a citizen of Swaziland."

In making its conclusion, the Court stated that whether or not the jurisdiction granted to the High Court by s 56(1) was exclusive or not needed not to be decided. It was the exclusive jurisdiction given to the Special Tribunal which took away the entire jurisdiction of the High Court and according to the Appeal Court was "bad".

The Appeal Court judgement was delivered on the 29 March 1973. Shortly thereafter, and, to be precise, in less than two weeks, this being the 12 April 1973, the King's Proclamation to the nation, otherwise known as the 1973 Decree was issued. This decree has been in force in Swaziland up to present day. In terms of this legislation, the King, then Sobhwa II proclaimed that :

" (2) And whereas I have given grave consideration to the extremely serious situation which has now arisen in our country and have come to the following conclusion :

- (a) that the Constitution has indeed failed to provide the machinery for good Government and for the maintenance of peace and order.
- (b) that indeed the Constitution is the cause of growing unrest, insecurity dissatisfaction with the state of affairs in our country and an impediment to free and progressive development in all spheres of life;
- (c) that the Constitution has permitted the importation into our country of highly undesirable political practices alien to, and incompatible with the way of life in our society and designed to disrupt and destroy our own peaceful and constructive and essentially democratic methods of political activity ; increasingly this element engenders hostility, bitterness and unrest in our society;

- (d) that there is no constitutional way of effecting the necessary amendments to the Constitution ; the method prescribed by the constitution itself is wholly impracticable and will bring about that disorder which any constitution is meant to inhibit;
- (e) that I and all my people heartily desire at long last, after a long constitutional struggle, to achieve full freedom and independence under a constitution created by ourselves for ourselves in complete liberty without outside pressures; as a nation we desire to march forward progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of all our people.
- (3) Now Therefore I, SOBHUZA II, King of Swaziland, hereby declare that in Collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all Legislative, Executive and Judicial power is vested in myself and shall, for the Mean time, be exercised in collaboration with a council constituted by my Cabinet Ministers. I further declare that, to ensure the continued maintenance of peace, order and good government, my Armed Forces in conjunction with the Swaziland Royal Police have been posted to all strategic places and have taken charge of all Government places and all public services. I further declare that I, in collaboration with my Cabinet Ministers hereby decree that :
- A. The Constitution of the Kingdom of Swaziland which commenced on 6<sup>th</sup> September, 1968, is hereby repealed.
- B. All laws with the exception of the Constitution hereby repealed, shall remain in full force and effect and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this and ensuing decrees.”

The procedure and manner in which the Constitution of Swaziland was repealed can hardly be said to have complied with globally accepted constitutional and democratic principles. It is however not the purpose of this paper to look into the irregularities or otherwise of the manner in which the Constitution was repealed, save to mention that the above decree still remains in force in Swaziland.

Geographically, Swaziland is a relatively small country with an area of 17, 363 sq KM.<sup>22</sup> Its population is estimated to be slightly above 1 million<sup>23</sup> with Swazis said to be constituting 97% of this figure while the remaining 3% is made up of Europeans.<sup>24</sup> The population growth is stated to be 2.9% while the official languages are SiSwati and English. The unemployment rate as at the year 1997 was fixed at 28.8%.<sup>25</sup> The land is divided into two parts namely, Swazi Nation Land and Commercial land. The former part is the larger of the two and controlled by Chiefs who are said to be guarding the land on behalf of the King. There is no ownership of land in the Swazi Nation Land as it is said the land belongs to the King.

During the month of July 2005, a new Constitution was adopted in Swaziland to be effective in January 2006. The Constitution will bring about important changes in Swaziland which could either see the country going in a positive direction or in worse situation. When the process of writing the constitution was initiated, there was general discontent from the various stake holders especially the workers organizations because of the manner in which the Terms of Reference were proclaimed by the present King. There was no input invited from the various group representatives on how the process was to be carried out and group submission was denied. It could not have been possible to compile submissions made on an individual basis in a population of 1.1 million. The committee that was appointed to 'collect the people's views' was appointed by the King and again

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<sup>22</sup> [www.gov.sz](http://www.gov.sz)

<sup>23</sup> Though the Government website states the figure to be 929 718. The Government website has not been updated for at least 5 years in this area

<sup>24</sup> [www.gov.sz](http://www.gov.sz)

<sup>25</sup> [www.gov.sz](http://www.gov.sz)

no input was invited from the various stakeholders. The compilation and editing<sup>26</sup> of the peoples' views was done solely by the King's appointees.

In section 1(1) of the new Constitution it is provided that "Swaziland is a unitary, sovereign, democratic Kingdom" and in s 2(1) that "this Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." The Constitution entrenches other several institutions including the Monarchy, the Legislature, the Executive and the judiciary, traditional institutions and a bill of rights. The dual system of government is entrenched in a number of clauses in the Constitution. In section 12 it is provided that "the King and Ngwenyama shall upon his installation as King and Ngwenyama take and subscribe to an oath for the due execution of his office in accordance with Swazi Law and Custom." Chapter XIV deals with the structures and role of the traditional institutions, namely how the King is appointed, the role of senior princes, the role of chiefs and the Swazi National Council.

The King still controls the executive branch of government and has an important role to play in the appointments and functions of the judiciary and the legislature. It is provided in 64(1) that "[t]he executive authority of Swaziland vests in the King as Head of State and shall be exercised in accordance with the provisions of the Constitution." As was the position in the old era the King is still responsible for appointing the Prime Minister on the advice of the King's Advisory Council constituted in terms of s 231 of the Constitution<sup>27</sup> and the appointment of cabinet ministers on the recommendation of the Prime Minister.<sup>28</sup> In s153 it is stated that the Chief Justice and the other justices of the superior courts shall be appointed by the King on the advice of the Judicial Service Commission. A worrying factor is to be found in s 151 in which it is provided that the High Court has no original but only review and appellate powers in matters in which a

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<sup>26</sup> The Chairman of the Constitutional Review Commission, Prince Mangaliso was frequently quoted complaining that the individual speakers were diverting from the real issues and instead addressing the commission on community problems such as water shortages and lack of proper infrastructure in their communities. In this regard editing of the submissions was necessary.

<sup>27</sup> Section 67(1)

<sup>28</sup> Section 67(2)

Swazi Court or Court Martial has jurisdiction under any law for the time being in force. The High Court also does not have jurisdiction over several other traditional institutions including the Ngwenyama (King) in the exercise of his functions, the office of the Queen mother, the procedure and revocation of the Swazi National Council.<sup>29</sup> It is yet to be seen whether this document will work to the benefit of the entire Swazi nation or whether it will truly be regarded as the supreme law by the entire Swazi nation including the leaders.

South Africa on the other hand can be said to be standing on a different footing from Swaziland as regards the political dispensation, historical background, economic system and geographical factors. The Constitution which came into force in 1996 has created a solid direction within the structures of government and the regulation of relations between government institutions *per se* and the regulation of relations between the state and the people of that country. There are some examples that may go to demonstrate that the constitution is the supreme law of the land and that no person or enterprise is above the law. In *President of the Republic of South Africa v. Hugo*<sup>30</sup> the powers of the President to make certain regulations were questioned and the matter was decided fairly and independently by the courts of the land without interference by the government. In *Pharmaceutical Manufacturers Association of South Africa : In re President of the Republic of South Africa & Others*<sup>31</sup> similarly the powers of the President to make certain regulations were reviewed and set aside as being lacking in rationality.

While Swaziland attained full independence from Britain in September 6, 1968 with minimum struggle, the same cannot be said of South Africa. South Africa's experience is vividly described by Chaskalson P in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*<sup>32</sup> in the following words :

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<sup>29</sup> Section 151(8)

<sup>30</sup> [1997] 6 BCLR 708 (CC)

<sup>31</sup> 2000 (2) SA 674 (CC)

<sup>32</sup> (1996) 17 *Industrial Law Journal* 821 (CC)

“ South Africa’s past has been aptly described as that of a deeply ‘divided society characterized by strife, conflict, untold suffering and injustice’ which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear guilt and revenge. From the outset the country maintained a colonial heritage of colonial discrimination : in most of the country, the franchise was reserved for white males and a rigid system of economic and social segregation was enforced. The administration of African tribal territories through vassal ‘traditional authorities’ passed smoothly from British colonial rule to the new government, which continued its predecessor’s policy”,<sup>33</sup>

With an estimated population of 44 million, South Africa is a country well recognized for its multi ethnic heritage and has 11 official languages.<sup>34</sup> The labour force makes up 14.4 million while 4.2 million of the economically active population are said to be unemployed.<sup>35</sup>

#### **4. Labour regulation in South Africa and Swaziland**

The Labour Relations Act (“the LRA”)<sup>36</sup> and the other employment laws in South Africa including the Skills Development Act,<sup>37</sup> the Employment Equity Act<sup>38</sup> and the Basic Conditions of Employment Act<sup>39</sup> were all aimed at addressing the peculiar circumstances of the country taking into account the country’s history, social and political environment and also the economic direction of the country. By way of illustration, it is contended by Du Toit et al<sup>40</sup> that the regulation of unfair discrimination in the LRA was regarded as an interim measure pending the introduction of a more comprehensive legislation to regulate the subject of discrimination in South Africa. It was felt by the legislature that it needed a separate legal instrument to effectively deal with this issue on account of South Africa’s past experience. Discrimination could not have affected Swaziland in the same way as

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<sup>33</sup> At pp 824-825

<sup>34</sup> Section 6(1) of the Constitution of South Africa, 1996

<sup>35</sup> Central Statistical Survey, 1996

<sup>36</sup> Act 66 of 1995

<sup>37</sup> Act 97 of 1998

<sup>38</sup> 55 of 1998

<sup>39</sup> 75 of 1997

<sup>40</sup> Labour Relations Law, 4<sup>th</sup> ed.

South Africa. Again the imbalance and the ‘legalized’ discrimination in the work place witnessed in South Africa was not experienced in Swaziland. The challenge in South Africa therefore was to come up with a model that would address these inequalities while at the same time not losing sight of the fact that labour regulation essentially deals with the employer-employee relationship.

The Swaziland Industrial Relations Act (“the IRA”)<sup>41</sup> was structured along the lines of the LRA so that some provisions of the former are similar in all respects as those contained in the LRA. The two models seek to address labour conflict through the processes of conciliation and arbitration. The conciliation stages in both models are similar in all respects. In s 135 of the LRA which deals with the resolution of disputes through conciliation, it is provided that when a dispute has been referred to the Commission, (the Commission for Conciliation, Mediation and Arbitration: (“the CCMA”)) must appoint a commissioner to attempt to resolve it through conciliation. A similar provision is contained in the IRA as regards the process of resolving the dispute through conciliation. The arbitration process, which in both models immediately come after the dispute remains unresolved through conciliation, however differ in content and scope. These processes will be discussed in detail below.

The South African model of dispute resolution relies heavily on arbitration as the ultimate mechanism of resolving those specific disputes referred to the commission in terms of the Act. The arbitration process was intended to be the last stop in unfair dismissal cases but in practical terms this has not been the case. More cases have been referred to the Labour Court seeking to review arbitration awards in consequence of which the distinction between appeals and reviews somehow became blurred. The high number of cases taken to the Labour Court at times under the guise of reviews has led to Pillay J to make the following remarks in *Shoprite Checkers (Pty) Ltd v. CCMA & Others*<sup>42</sup>:

“in my view there is an emerging consensus in the industrial relations

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<sup>41</sup> No.1 of 2000

<sup>42</sup> Case No P 394/2004 (Unreported)

community that the systems and institutions established under the LRA eight years ago, in particular the CCMA and the Labour Courts are not functioning optimally. Originally, these institutions were concerned with providing a quick, efficient and free public service. the CCMA was devised as a one stop dispute resolution shop. Dismissals which constitute the bulk of the disputes were meant to be resolved by a two stage process of conciliation and arbitration. An attempt was made by introducing the con-arb in the amendment to the LRA to make the two stage process seamless. As it is used so infrequently, it has not succeeded in improving the efficiency of dispute resolution.”

The learned judge went on to opine that whereas the review was intended to be exceptional, that it had now increasingly become a norm.<sup>43</sup> Review of arbitration awards under the LRA is allowed only in limited circumstances spelt out in the Act. A common element in both the Swaziland model and the South Africa model is that the two systems seek to provide a quick and less costly model that would be easily accessible to all parties involved in labour disputes. During the conciliation stage, there are no financial implications attached and so is the position during the arbitration. A party who however elects to approach the Labour Court by way of review may be liable for the costs of the proceedings in the event of losing the matter.

The Swaziland labour dispute resolution model was able to come up with a cost-free system at all levels, namely conciliation, arbitration ( if and when undertaken by CMAC) and the Industrial Court. The Industrial Court is not bound to grant an order of costs against a losing party involved in a dispute except in those few exceptional cases which in the discretion of the court warrant such an order. In Swaziland, as is the case in South Africa, the process of conciliation is not effectively being put into use which has resulted to a state whereby the process is regarded as being nothing more than a formality. This again is easily demonstrated by the huge volume of matters awaiting trial before the Industrial Court. It is submitted that the Swaziland model has openly failed to live up to

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<sup>43</sup> At p.6



the expectation of resolving labour disputes expeditiously as was the expectation when the legislation was enacted.

The economic differences between the two countries would ordinarily have required that Swaziland should take the South African route of compulsory arbitration in the event of failure to resolve the dispute in conciliation, but again the significance of having disputes decided with finality by a lower tribunal could not have been well received by the stake holders. Another issue that arises between the two models is that South Africa, either because of its commitment or its vast financial and human resources has been able to conveniently effect amendments to its legislations so as to bring it in line with the aspirations of the people, which thing cannot be said of Swaziland.

#### **5. The Commission for Conciliation, Mediation and Arbitration: Has it been successful in its quest to resolve labour disputes quickly and efficiently ?**

The Commission for conciliation, Mediation and Arbitration is established by s 112 of the LRA as a body corporate capable of suing and being sued in its own name. This is an independent body that was established to resolve labour disputes. A historical background which led to the establishment of the present CCMA is discussed by Du Toit et al in which the following is said by the authors :

“ A number of negative consequences flowed from the failure to conciliate more disputes. First, the statutory machinery made little headway in reducing adversarialism in industrial relations. This, and the cumbersome procedures for settling disputes, contributed to a high rate of strikes and lock-outs. second, the poor performance of conciliation boards and industrial councils added to the case load of the poorly resourced and inadequately staffed Industrial Court. The result was that the court had built up an enormous backlog of cases. The Industrial Court was, further more, not the ideal institution to settle disputes quickly and inexpensively. Its focus was on adjudication and rule making after the event rather than proactive

intervention.”<sup>44</sup>

In order for the CCMA to have jurisdiction to preside over any matter referred to it, all the jurisdictional requirements must be established. Du Toit et al point out that six conditions must be established in order that the CCMA may have jurisdiction to determine a labour dispute and these are:

- (a) the existence of a dispute
- (b) the dispute must be between employer and employee
- (c) the dispute falls within the jurisdiction of the CCMA
- (d) the issue in dispute is not subject to a collective agreement
- (e) the parties are not subject to a bargaining council with jurisdiction
- (f) the dispute must have been reported within the time frame stipulated in the Act.

In *NUM v. East Rand Gold and Uranium Co*,<sup>45</sup> the Commissioner, Advocate Loveday, correctly observed that “the CCMA may only arbitrate disputes in respect of which arbitration [is permitted] in accordance with section 136(1) read with section 138 and section 142. The absence [of] a jurisdictional fact cannot be condoned by the CCMA in a case of this nature nor can the parties confer jurisdiction to arbitrate where the Act does not provide for it. In *SACCAWU V. Speciality Stores Ltd*”<sup>46</sup> Froneman said the following as regards the CCMA’s jurisdiction:

“where the commission purports to fulfil its conciliatory and arbitral functions, it must do so in the same manner as other bodies authorized

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<sup>44</sup> At p.22

<sup>45</sup> [1997] 2 BLLR 225

<sup>46</sup> [1998] 4 BLLR 352 (LAC)

by statute to perform certain functions [as] theirs. This means that it can only lawfully perform those functions if it has the competence or jurisdiction to do so in terms of the Act. The manner in which it exercises that jurisdiction must also be in accordance with the provisions of the Act and the law.”

In the *SACCAWU* case, the court made a distinction between, on the one hand, pre-conditions which must exist before a public authority may act, and then once these have been established, the manner in which such public authority must exercise those powers. It is then that CCMA will attempt to resolve the dispute through the process of conciliation, failing which arbitration.

The Labour Relations Act does not contain any definition of what is conciliation, mediation or arbitration. Instead in s135 it is simply provided that upon a dispute being referred to the commission, the commission must appoint a commissioner to ‘attempt’ to resolve the dispute through conciliation. The Act also does not define or describe what ‘attempting’ to resolve the dispute through conciliation entails. In subsection (3) it is provided that the commissioner must determine a process to attempt to resolve the dispute, which may include-

- (a) mediating the dispute
- (b) conducting a fact-finding exercise; and
- (c) making a recommendation to the parties, which may be in the form of an advisory arbitration award

The Black’s Law Dictionary defines conciliation as meaning “[a] process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved; [especially] a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle

their differences” The definition seems to suggest that the person facilitating the process must firstly, be a person with specialized knowledge in particular of the problem giving rise to the dispute. ‘Exploring’ on how to resolve the dispute as envisaged in the definition requires both a procedural and substantive knowledge of resolving the dispute. Du Toit et al<sup>47</sup> state that conciliation means to reconcile or bring together, especially opposing sides in an industrial dispute and that conciliation should be private, confidential and without prejudice. According to these authors, the process allows the parties to arrive at their own solution as opposed to employing tactics of the law.<sup>48</sup> The reason why conciliation has not been successful can perhaps be attributed to the fact that this process requires a willingness on the parties to resolve the dispute themselves which ordinarily would require a compromise on either of the party’s expectation. In the majority of cases, conciliation becomes a mere formality which the parties will go through in order to get to the next stage, namely arbitration. In this regard Du Toit et al state that in reality the conciliation of rights disputes take place “in the shadow of the law.”<sup>49</sup>

The problems associated with conciliation and mediation are analysed by Judge Nigel Fricker and J Walker<sup>50</sup> in which it is argued that the reason why there is a promotion of the so-called “alternatives” does not arise because people are dissatisfied with the existing system of dispute resolution but simply because a need arose to extend and clarify the range of other options available. In this respect an attempt is made to match disputes to particular disputes resolution mechanisms, taking into account the following factors:

- (i) the nature of the dispute
- (ii) the relationship between the disputants

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<sup>47</sup> Labour Relations Law, 4<sup>th</sup> ed at p.102

<sup>48</sup> At p.102

<sup>49</sup> At p.359

<sup>50</sup> ‘Alternative Dispute Resolution – State responsibility or second best ? (1994) 13 Civil Justice Quarterly

- (iii) the importance of providing effective and efficient procedures which are themselves important contributors to the existence of justice.

What also comes out from the discussion by Fricker and Walker is that the economic implications involved in the settlement of disputes are an important consideration but not necessarily paramount.<sup>51</sup> There is some element of truth in this statement judging in the manner in which matters are taken to the Labour Court on review, despite the cost implications which the legislature was seeking to regulate. It is submitted by Fricker and Walker that we should encourage and support the alternative dispute resolution system in that (1) it relieves the court of congestion while at the same time minimizing undue costs and delays, (2) it enhances community involvement in the dispute resolution process, (3) it facilitates access to justice and (4) it provides a more effective dispute resolution.<sup>52</sup>

An additional consideration which could be linked to the last element is that the parties to the dispute must be able to relate and identify with the dispute resolution system, as opposed to the formality imposed by a court system. Just like in divorce proceedings, unfair dismissal cases usually tend to involve a high degree of emotions and understandably so since employment can be regarded as the pillar stone of livelihood. Unfair dismissal cases are important and it is for this reason that some people will prefer that their cases be dealt with by a competent court of law. However since the present dispute resolution model require that these disputes should be resolved through conciliation and arbitration, then an effort must be undertaken to ensure that these processes are a success. In the case of conciliation, the commission's powers are limited to attempting to resolve the dispute, failing which the commission must issue a certificate of unresolved dispute. The parties to the dispute go to the conciliation process knowing that the worst case scenario is for the commissioner to issue a certificate of unresolved dispute. It is submitted that in order for the process of conciliation to be successful, consideration should be made of encouraging the parties to settle during this process by

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<sup>51</sup> At p.32

<sup>52</sup> At p.33

imposing sanctions, for instance, by awarding costs where a party has unreasonably declined to accept a reasonable proposal to settle the matter amicably.

Arbitration as a labour dispute resolution model in the context of the LRA has had its own successes and failures. Arbitration is similar to litigation with the exception of the differences in formality and speed within which a final outcome is reached.<sup>53</sup> The LRA empowers the commission to determine the practice and procedure to be adopted in the use of this process.<sup>54</sup> Du Toit et al state that “whether compulsory (as under the LRA) or voluntary, arbitration is designed to dispose of a dispute finally through an award which is subject to review but not to appeal on the law.”<sup>55</sup> In *Gibb v. Nedcor Ltd*<sup>56</sup> the court restated the principle that when a matter is referred to arbitration in terms of the LRA, that this does not amount to a review of the decision (i.e in the case of a dismissed employee) that led to the dispute but rather that the matter should be heard afresh.

The idea within the LRA framework is that disputes should be resolved with finality through the arbitration method. S 143(1) provides that an arbitration award issued by a Commissioner is final and binding and may be made an order of the Labour Court in terms of s 158 (1)(c), unless it is an advisory award. Defective arbitration awards are subject to review by the Labour in limited circumstances. These grounds are set out in s145 of the LRA. The section provides that “Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the Labour Court for an order setting aside the arbitration award...” In s 145(2) it is provided that “a defect referred to in subsection (1) means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator

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<sup>53</sup> Du Toit et al, *ibid*, at p.109

<sup>54</sup> s 138 (1) of the LRA, 1995

<sup>55</sup> At p. 109

<sup>56</sup> (1998) 19 ILJ 364 (LC)

- (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
- (iii) exceeded the commissioner's powers."

The question arising is why is people frequently use the review process even in those circumstances which the dispute does not properly fall within the scope of this section. As was noted by Pillay J in the *Shoprite Checkers*<sup>57</sup> case, the parties to the process of arbitration frequently seek the intervention of the Labour Court sometime with total disregard of the provisions of sections 145. It is generally an acceptable norm that litigants will resort to appeal or review in circumstances where they are not happy about the decision of a lower tribunal. The trend therefore gives an indication of a general discontent with the present system either in the manner in which the process is undertaken or the substantive application of the law during this process.

The fact that the arbitration process should resolve labour disputes with finality raises the issue of competence and expertise to be possessed by the officers of the commission in the determination of labour disputes. The Act on this subject provides that the governing body must appoint 'adequately qualified' persons as it considers necessary to perform the functions of commissioners by or in terms of this Act or any other law. In *Gibb v. Nedcor*<sup>58</sup> reiterated that arbitration takes the form of adjudication. Adjudication introduces some elements of formality in the actual conduct of the proceedings, this fact being associated with formal court proceedings. Though the commission is given the power to determine the nature and scope of the arbitration process, it is nonetheless submitted that the commissioner in such a case must be familiar with the general principles and procedures of conducting a trial and a general knowledge of the common law limitations of testing decisions of administrative tribunals. These considerations may include, but not limited to the following factors:

- (a) right to a fair hearing

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<sup>57</sup> n. 31, above

<sup>58</sup> n.51 above

- (b) that administrative officer must not fetter his or her discretion
- (c) that officer must apply his or her mind to all relevant considerations
- (d) that the decision taken by officer must not be unreasonable

This having been done, the Commissioner must then determine the procedure to be adopted in the actual conduct of the proceedings with a view of drawing a conclusion based on the facts and evidence adduced during the conduct of the arbitration process. Section 138 of the LRA provides that “the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with substantial merits of the dispute with the minimum of legal formalities.” First it is not desirable that the procedure to be adopted in the conduct of arbitration proceedings should be left to the individual discretion of the commissioners of the commission. It is suggested that the procedure should be a simple one but also one that is uniform and known in advance so that each one of the parties knows what the expectations are during the arbitration. This will also help the commission in recording outcomes that are uniform and consistent in similar cases. Developing a uniform system is not necessarily introducing a legal formality, but merely the creation of an open and predictable system which will produce consistent results, thereby instilling trust and confidence in the CCMA arbitration system. In the second instance, the process of resolving disputes “fairly and quickly” as dictated by the Act in some instances, may not be practical, especially in the context of the preceding subsections which provide for the resolution of disputes by the giving of evidence, calling witnesses, questioning the witnesses of the other party and making concluding arguments. If emphasis is on resolving the dispute ‘quickly’ then it must be accepted that the process may not be fair in some instances and vice-versa.

In order to effectively conduct arbitration proceedings, the commissioner must be able to retain control over the proceedings. In a formal court hearing, this aspect is covered by a



firmly entrenched professional etiquette that members of the profession accord to one another and to the presiding officer. In addition to this, the common law offence of contempt of court helps the judge to retain control over the proceedings during trial. The arbitration process must therefore have a built-in legitimate mechanism of exerting authority and respect from the participants in the system.

In conclusion, it is submitted that though the dispute resolution mechanism in South Africa can be considered to have attained the desired results in so far as accessibility and expeditiously resolving labour disputes is concerned, however the system is still lacking in terms of providing a satisfying and effective dispute resolution model. It is further suggested that the LRA should define what is meant by the phrase 'adequately qualified' commissioners, at the very least by imposing minimum qualification to be possessed by these officers. In this regard, it is perhaps desirable that the officers of the commission must have basic knowledge on the rules of evidence on the one hand, and a basic knowledge on substantive law, in particular in labour law.

## **6. The Conciliation, Mediation and Arbitration Commission in Swaziland ; Its failures and successes**

The name accorded to the Conciliation, Mediation and Arbitration Commission ("the CMAC") as a labour dispute resolution model demonstrates that the legislature in Swaziland found South Africa's CCMA to be appealing, if not in substance, at least in appearance. The CMAC is established under Chapter VIII of the Industrial Relations Act ("the IRA")<sup>59</sup> which deals with dispute procedure. This body is established as an independent body capable of suing and being sued in its own name.<sup>60</sup> The commission is an independent body free from the control of any person including but not limited to, any statutory body, Government, political entity, employer federation or organization.<sup>61</sup>

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<sup>59</sup> Act no.1 of 2000

<sup>60</sup> Section 62 (1) and (2)

<sup>61</sup> Section 63

The reporting of labour disputes in the IRA was initially regulated in s 76<sup>62</sup> of the Act in which was set out the list of persons or bodies legally entitled to report a dispute to the Commissioner of Labour including an employer,<sup>63</sup> an employee<sup>64</sup> or employers and employees organizations.<sup>65</sup> The Labour Commissioner's powers were limited to assessing the merits of the dispute and the determination of compliance with the time limits of reporting a dispute in terms of the Act.<sup>66</sup> Section 77 deals with contents of the report and how such report is to be delivered to the other party affected thereby. The Commissioner of Labour was then required to transmit the report to the CMAC for conciliation, which latter body would then appoint a commissioner to attempt to resolve the dispute within 21 days.<sup>67</sup>

The involvement of the Commissioner of Labour in the reporting of disputes was outdone in the recently introduced 2004 amendments. Under the Amendment Act, a dispute is required to be reported directly to the offices of CMAC in the Region where the dispute first arose. This is a desirable amendment so that the process of conciliation and arbitration is seen as independent from Government interference.

The Commission is required by the IRA to appoint a Commissioner who in conciliating the dispute, shall determine a process to attempt to resolve the dispute which may include (and here we see a direct copy of the LRA provisions)-

- (a) mediating the dispute;
- (b) conducting a fact finding exercise ; and

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<sup>62</sup> This section has been amended to allow a dispute to be now reported directly to the CMAC as opposed to reporting the dispute first to the Labour Commissioner

<sup>63</sup> S 76 (1) (a)

<sup>64</sup> S 76 (1) (b)

<sup>65</sup> S 76 (1) (c)

<sup>66</sup> S 76 (2), (4) and (5)

<sup>67</sup> S 80 (1)

- (c) making recommendation to the parties, which may be in the form of an advisory arbitration award.

At the end of the 21 day period, the Act requires that the commissioner must issue a certificate stating whether or not the dispute has been settled. Where the dispute is resolved, either party may prepare a memorandum of agreement setting out the terms upon which the agreement was reached and such memorandum shall be lodged with the Court for registration by any of the parties.<sup>68</sup> However in the case that the dispute remains unresolved after conciliation, the dispute shall be certified as an “unresolved dispute” in writing by the commission and the conciliating officer shall state the reasons why settlement was prevented during the process of conciliation.<sup>69</sup>

If the unresolved dispute concerns the application to an employee of existing terms and conditions of employment or the denial of any right applicable to an employee in respect of dismissal, employment, reinstatement or re engagement of an employee, either party to the dispute can make an application to the Court (Industrial Court) for determination of the dispute or if the parties agree refer the matter to the commission for determination.<sup>70</sup> Arbitration under IRA is not compulsory but the parties can, if they so wish refer the matter to arbitration in the event of failure to resolve the dispute through conciliation. In order to curb the incident of non-appearance by either of the parties during conciliation, the Amendment Act stipulates that if a party fails to attend conciliation, the Commissioner may refer the matter to arbitration and the arbitrator may grant default judgement.

In section 64(5) the commission is empowered to subpoena persons and/or documents which may be necessary in conciliation and arbitration proceedings. In the actual conduct of the proceedings, the law relating to privilege as it applies to a person subpoenaed to give evidence or produce a book and the questioning of such person in a Court of law

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<sup>68</sup> S 84 (1)

<sup>69</sup> S 85 (1)(a) and (c)

<sup>70</sup> S 85 (2)

applies in the case of proceedings of the commission.<sup>71</sup> It is doubtful whether the legislature in Swaziland seriously intended to bring the law of privilege in the conduct of conciliation and arbitration proceedings before the commission. The law relating to privilege may in some instances entail the non-disclosure or the with-holding of information in the proceedings. This may defeat the spirit of settling the manner amicably, especially in the context of conciliation. It would also seem that in enacting this provision, the legislature in Swaziland ignored the fact that the parties in any proceedings in a court of law are also regarded as witnesses. If therefore the employer or the employee as the case may be would elect to remain silent during the conciliation process, this being one of the privileges accorded to an accused person in a court of law, then the very spirit of the Act would be defeated.

In Swaziland therefore, the formalities and rules of evidence applicable in a court of law are introduced by S 64 (6) of the IRA and this applies in the conduct of both the conciliation and arbitration process. If these processes were to be put into good use, there would be no need for complaint as regards the outcome of the proceedings. However as indicated above, there is a high number of cases that remain unresolved after conciliation which has in turn resulted in high volume of cases awaiting trial in accordance with section 85(2) of the IRA. The Industrial Court may only entertain matters in which a certificate of unresolved dispute has been granted. As a matter of practice, the Industrial Court has issued a direction that in all matters that come before it on application, a certificate of unresolved dispute must be attached to such application.

The Swaziland Industrial Relations Act has had its own successes especially in the area of being accessible to all persons in the country. Reporting a dispute from a practical perspective entails collecting the dispute form from the offices of the Labour Commissioner (with offices in all the four regions of the country) free of charge, completing the form: essentially stating the particulars of the applicant (names, address and telephone numbers) and also the particulars of the employer; stating the date of

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<sup>71</sup> S 64 (6) of the IRA

commencement of employment, the capacity held in such employment and the remuneration paid; the date on which termination of employment was effected; brief particulars of the events leading to the dispute and what steps, if any were taken to resolve the dispute. The language and manner of the information required was put in simple language. The dispute form, until recently,<sup>72</sup> would then be transmitted to the commission which body would then summon the other party to the dispute in the manner set out in the Act. A date of hearing is then fixed by the commission and the parties are notified in writing about the date of the hearing.

The time for reporting a dispute and the time within which the dispute is conciliated usually do not present problems. In the event that the matter goes to the Industrial Court, the fear that the losing party may have costs awarded against him or her was also dispensed with as it is provided in s 13(1) of the LRA that: “the Court may make an order for payment of costs, according to the requirements of law and fairness and in so doing , the Court may take into account the fact that a party acted frivolously, vexatiously or with deliberate delay bringing or defending a proceeding.” There is no requirement that the court papers must have stamps on them. In s 12 (5) it stated that the witness fees and any rules laid down by the High Court in connection with such fees payable to any person subpoenaed to give evidence in a criminal case before the High Court, shall with the necessary modifications, apply to any person ordered to attend the court in terms of the court.

If a party, to proceed with the matter at the High Court, the costs involved are those as between attorney and client since it would not be a simple matter for an unrepresented litigant to draft the court papers in the standard expected of court papers. But again if the litigants are familiar with the drafting requirements, then the process is absolutely free. The one aspect in which the labour dispute resolution mechanism has failed to deliver according to expectation is at the level of the Industrial Court. The country has only one Industrial Court sitting at the capital city of the country. All the other regions, including the region in which the court sits are expected to utilize the Industrial Court. There are presently two judges of the Industrial Court (in the whole

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<sup>72</sup> The 2004 amendments to the Act now require the dispute to be lodged directly with CMAC.

country), one still an acting judge and the other being presently engaged in a one year contract. In the list of cases awaiting trial, there are some cases dating way back to the year 2000 which are still awaiting the allocation of trial dates.

It would be a far fetched expectation to require that there should be at least one Industrial Court sitting in the four regions of the country, given the fact that there is still one High Court in the country which also operates as the appeal court. The backlog of cases at the Industrial Court can be reduced by engaging more judges to deal with the ever increasing number of cases awaiting trial. In comparative terms, the Swaziland model has failed in material respects to provide a mechanism of resolving labour disputes quickly and efficiently. It is strange that Swaziland opted to use the Industrial Court after the conciliation process without assessing the human and financial resources on the part of government to set up such a system. Though the Industrial Court would ideally be the preferred method, the present situation in the country seems to suggest that the arbitration model would have been the better method of resolving disputes after conciliation. At present arbitration is only confined to situations where either of the parties fail to attend conciliation.

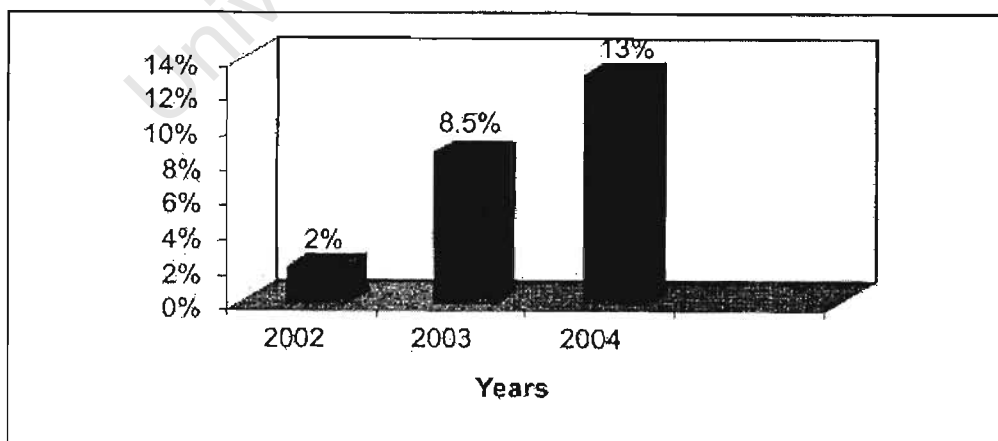
The annual report compiled by CMAC reflecting on the year 2004 raises interesting issues which are worth to mention. It is stated in the report that during the period of the 1<sup>st</sup> April 2003 to 31<sup>st</sup> March 2004, a total of 1417 were reported to CMAC, which according to the report represented an average of 5 disputes reported per day. The figure shown above indicated a 7% increase on the referrals that had been received the previous year. Out of the 1417 disputes reported during this period, only 25 (1%) were screened out and referred back to the Department of Labour because they were found to be out of CMAC'S jurisdiction.

The report further indicates that 267 (19%) of the reported disputes were abandoned because the applicants failed to show up during conciliation. This reflected an increase of 3% of abandoned cases in the previous year. The report cites several factors for the high number abandoned cases including the fact of the lengthy process of having a dispute resolved. Due to the length of time required for the transmission of a dispute to the

Commissioner of Labour to the time taken in serving the affected or interested parties, most applicants were found to either left their places of work or were no longer using the given addresses. Despite the fact that the report indicates the reporting of an average of 5 disputes per day, it mentions that case backlog continues to be a major problem within the commission.

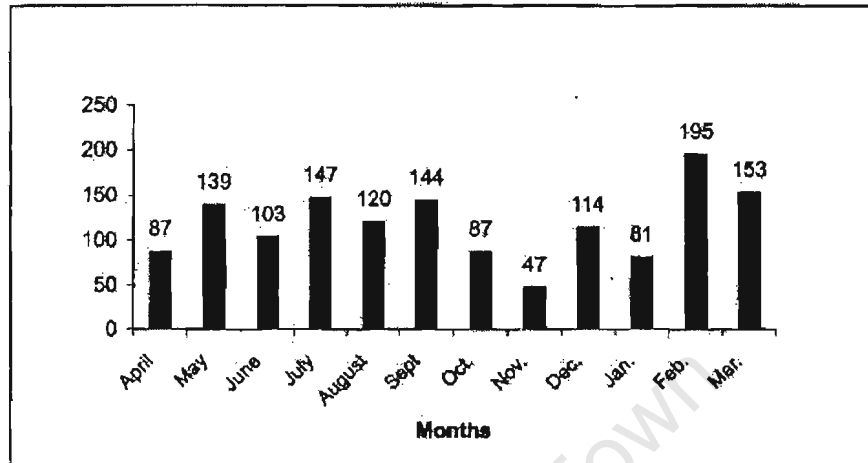
The settlement rate of disputes is stated to have dropped to 57% compared to the previous year's settlement rate of 61%. The drop in the settlement rate is said to have resulted from the delay in the appointment of the Judge of the Industrial Court, which thing increased the turnover period for unresolved cases. Others factors cited in the report to have caused the drop in the settlement rate include the decline of the economy which resulted in the agitation of the industrial relations climate. Figures 3.1, 3.3, 3.4 and 3.5 show the distribute transmission of disputes per month, referral to arbitration, dispute distribution by region and dispute distribution by sector.<sup>73</sup>

### 3.3 Referral to Arbitration



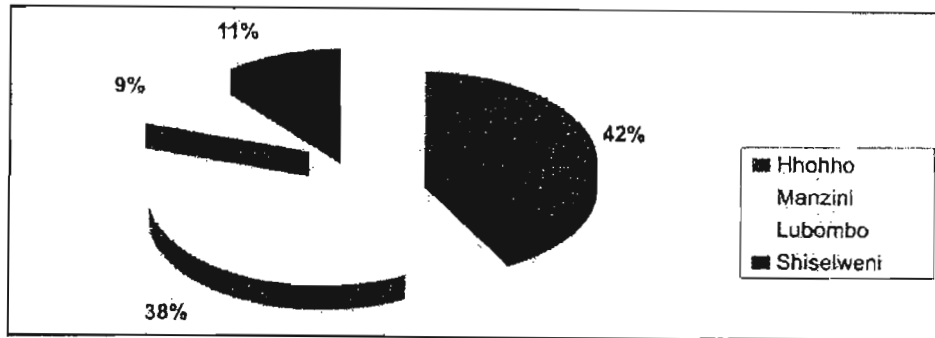
<sup>73</sup> All the figures are sourced from the CMAC Annual Report for the year 2004

### 3.1 Dispute transmission by month

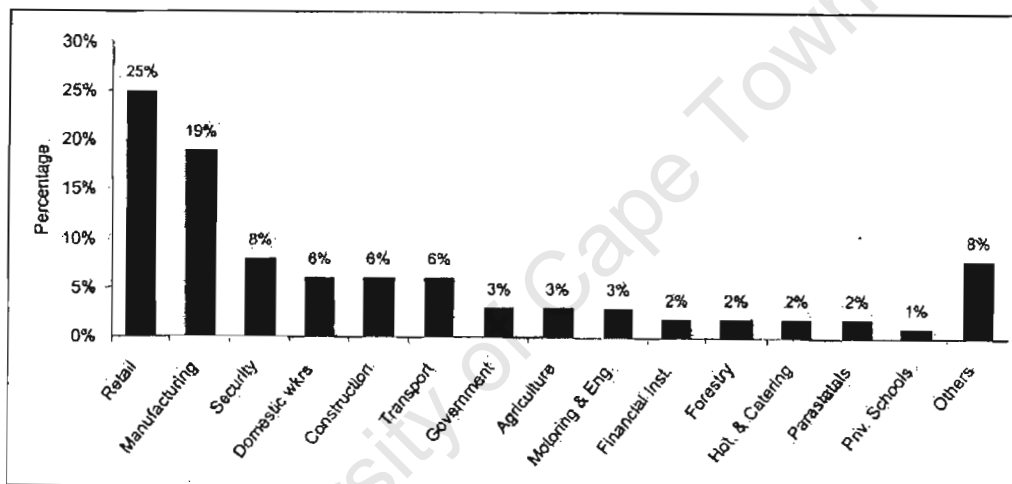




### 3.4 Dispute distribution by region



### 3.5 Dispute distribution by sector



## 7. The exclusive jurisdiction of the Labour Court in South Africa in relation to contracts of employment and review powers

### Historical background

Prior to the coming into operation of the Labour Relations Act, 66 of 1995, the Industrial Court, as it then was, had developed a jurisprudence that came to be classified as “unfair labour practice.”<sup>74</sup> This concept developed as a result of the 1979 amendments to the Labour Relations Act, 1956. According to Du Toit et al, the conduct of employers,

<sup>74</sup> Du Toit et al, Labour Relations Law, 4<sup>th</sup> ed, 2003 at p.459

employees or their organizations came to be assessed through an ‘equity-based labour jurisprudence’, which meant going beyond determining the lawfulness or fairness of the conduct of the employer’s conduct but also asking the question whether the employer’s conduct was not capricious, arbitrary or inconsistent in the context of a modern labour environment.<sup>75</sup> Equity was defined as a “system of law which is more consonant with opinions current for the time being as to a just regulation of the mutual rights and duties of men living in a civilized society.”<sup>76</sup>

In giving effect to this ‘equity based jurisprudence’, the Industrial Court drew a distinction between disputes of rights and disputes of interest. Rights disputes were defined to mean the infringement, application or interpretation of existing rights contained in a contract of employment, collective agreement or statute and it were these rights that properly fell within the jurisdiction of the Industrial Court. Disputes of interest on the other hand were primarily concerned with the ‘creation of fresh rights, such as higher wages, modification of existing collective agreements and other related issues.’<sup>77</sup> A new labour law dispensation was witnessed through the enactment of the Labour Relations Act in 1995. Du Toit et al contend that the 1995 LRA codified all the different kinds of unfair labour practice under the old Act so that all series of unfair labour practices were came to be treated in the same footing as disputes of rights, subject to arbitration or adjudication by the Labour Court on the same basis as dismissal disputes.

## **8. The ‘exclusive’ jurisdiction of the Labour Court scrutinised**

The Labour Court in South Africa is established by s 151(1) of the Labour Relations Act, 66 of 1995. It is provided in sub-section(1) that “[t]he Labour Court is hereby established as a Court of law and equity.” In subsection (2) it is stated that the Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the supreme

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<sup>75</sup> At p.459

<sup>76</sup> Cameron in Brassey et al *The New Labour Law* (1987) at 226 quoting Sanders (ed) *Words and Phrases Legally defined* (1969) 2 ed Vol 2 under ‘equity’ quoted in Du Toit et al, *supra*, at p.459

<sup>77</sup> Du Tout et al, *supra*, at p.459

court has in relation to the matters under its jurisdiction. There are two provisions in the 1995 LRA, namely s157(1) and s158(1)(g) dealing with the jurisdiction of the labour court which have given rise to a considerable amount of jurisprudence in the area of the labour court's power to determine contracts of employment and also the limitation of the labour court's review powers.

In s157 (1) it is provided that "subject to the constitution and s173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court." In the exercise of its jurisdiction, the Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.<sup>78</sup> The controversy in s 157 (1) is to be found in the use of the phrase 'exclusive jurisdiction' conferred upon the Labour Court in respect of all matters that elsewhere in terms of the Act or any other law are to be determined by the Labour Court. 'Exclusive jurisdiction' is defined as "[a] court's power to adjudicate an action or class of actions *to the exclusion of all other courts*"<sup>79</sup> [my emphasis] .

The tension brought by s157 (1) arises because of the inherent power bestowed upon the High Court under the common to hear all disputes arising from an alleged breach by either party in any contract, despite the nature of that contract. The starting point is that contracts of employment are not different from any other contract in so far as they constitute an agreement entered into by one or more parties to the transaction. The contract arises because the employer makes an offer of employment to the employee, which offer is accepted by the employee on the terms and conditions which the parties may specifically agree to. The difficulty arising relates to the terms and conditions imposed by the various pieces of legislations in seeking to regulate this relationship? Does this not have the effect of undoing the parties rights under the common law to direct their relationship in a particular way ? In this way, is it not safe to conclude that the

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<sup>78</sup> S 157 (4) of the LRA

<sup>79</sup> Black's Law Dictionary, 8<sup>th</sup> ed.

contract of employment is no longer just an ordinary contract subject to the jurisdiction of the High Court ?

One view is that the purpose of the legislature was to create a specialist court which would comprehensively deal with labour disputes to the 'exclusion of other courts.' This view has however been rejected by the high courts. In *Fedlife Assurance Ltd v. Wolfaardt*,<sup>80</sup> the appellant employer had entered into a fixed term contract of employment with the respondent employee that was intended to run for 5 years from 1 December 1996. However on the 31 December 1998, the appellant had repudiated the contract of employment on the ground that the employee's position had become redundant. The employee accepted the repudiation of his contract and thereafter instituted proceedings at the high court in which he claimed damages for breach of contract. The employer filed a special plea, arguing that in terms of s 157 (1) of the LRA, the Labour Court has exclusive jurisdiction to adjudicate on dismissals occasioned by operational requirements of the employer. The employee was not to be discouraged and he filed an exception on the grounds that the special plea filed on behalf of the employer did not disclose a defence to the employee's claim.

The High Court upheld the employee's exception and dismissed the employer's special plea. The employer appealed to the Supreme Court of Appeal. The main argument advanced on behalf of the employer was that an action for wrongful dismissal under the common law is no longer recognized by our law in that an employee claiming unfair dismissal can only be afforded redress under Chapter VII of the LRA. Chapter VIII of the LRA, so the argument went, codifies all the rights and remedies available to all the employees in situations of termination of their contracts of employment, thereby substituting the rights and remedies available to employees under the common law contract of employment. The Supreme Court was similarly not persuaded by the arguments advanced on behalf of the employer. In the court's view, the employee had pleaded a common-law claim for damages arising from the unlawful pre-mature repudiation of the fixed-term contract and refrained from relying on an 'unfair labour practice' by claiming compensation within the framework of the LRA.

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<sup>80</sup> (2001) 22 ILJ 2407 (SCA)

In delivering judgement in the above matter, Nugent AJA said the following; “in the present case a clearly identifiable and recognizable common-law claim for damages has been pleaded. The disclosure of the employer’s professed reason for repudiating the contract was merely surplusage and did not signal a resort to a claim under Chapter VII. In my view Chapter VII of the 1995 Act itself is not exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment. Whether approached from the perspective of the Constitutional dispensation and the common-law or merely from a construction of the 1995 itself, I do not think the respondent has been deprived of the common-law right that he now seeks to enforce. A contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law.”<sup>81</sup>

On the question whether the Labour Court had the exclusive jurisdiction to determine the matter, the Supreme Court held that in the present case the employee had accepted the repudiation, so that the remedial powers of the Labour Court were limited to providing compensation under s194 of the LRA. Thus “having deliberately set those restrictions [restrictions imposed by s 194 (2)] it seems difficult, if not impossible, to infer that the legislation intended (notwithstanding the apparently limitless scope of s 158 (1)(a) (vi) and s 193 (3) that the 1995 Act itself should nevertheless provide the employee with full balance of the common-law damages as well.”<sup>82</sup>

In a matter that gave rise to the same jurisdictional questions of the High Court to determine contracts of employment, namely, *Langevelt v. Vryburg Transitional Local Council & Others*,<sup>83</sup> Zondo, JP under the title ‘Jurisdictional problems in employment and labour disputes : A need for legislative intervention to streamline the dispute resolution system!’ raises the issue of efficiency with the South African resolution system as regards the following issues-

- (a) those matters which only the Labour Court has jurisdiction to deal with

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<sup>81</sup> at p.2417

<sup>82</sup> at p.2417

<sup>83</sup> (2001) 22 ILJ 1116 (LAC)

- (b) those matters which only the High Court has jurisdiction to deal with
- (c) those matters which both the Labour Court and the High Court can deal with
- (d) the matters which the CCMA, bargaining councils, the Labour Court, the High Court and the Constitutional Court can deal with in one way or the other.<sup>84</sup>

The court remarked that the problem is presented by the overlap of jurisdiction between the Labour Court and the High Court.<sup>85</sup> Expanding on the problem of the overlap, Zondo JP made the following remarks:

“ An examination of the law reports over the past four years when the Labour Court became fully operational reveals a number of employment and labour matters which have come before various High Courts. In most of those cases the High Courts have been confronted time and again with the question of whether they had jurisdiction in such matters despite the existence of the Labour Court or whether only the Labour Court had jurisdiction in such matters. A reading of those cases clearly reveals the jurisdictional complexities which the present state of the law has produced.”

The court then considered the cases of *Mondi Paper (A Division of Mondi Ltd) v. Paper Printing Wood & Allied Workers Union & Others*,<sup>86</sup> *Sappi Fine Papers (Pty) Ltd (Adamas Mills) v. Paper Printing Wood & Allied Workers Union & Others*,<sup>87</sup> *Coin Security Group v. SA Union of Security Officers & Other Workers*<sup>88</sup> and *Fourways Mall v. SA Commercial and Allied Workers Union*<sup>89</sup> and observed that all these cases had a identifiable common feature. In each of these cases the employees had engaged in a strike and the High Court had been approached for an order interdicting the strikers from engaging in acts of intimidation, assaults and other strike-acts of misconduct. In all these matters, the jurisdiction of the High Court to determine the cases had been questioned, and all the cases, the High Court felt it was competent for it to try the matters.

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<sup>84</sup> At p.1120

<sup>85</sup> At p.1120

<sup>86</sup> (1997) 18 ILJ 84(D)

<sup>87</sup> (1998) 19 ILJ 246 (SE)

<sup>88</sup> 1998 (1) SA 685 ©

<sup>89</sup> 1999 (3) SA 752(W)

The court referred to another case of *Minister of Correctional Services & Another v. Ngubo & Others*<sup>90</sup> in which certain employees of the Correctional Services in Pietermaritzburg were violently objecting against the appointment of an official of the department as the Provincial Commissioner of the department in Kwa-Zulu Natal and were demanding that this officer be removed from her new position. The employees engaged in acts of assault and intimidation and actually went to the extent of physically removing the official from her new office. An application was subsequently made by the employer to the High Court in which an order was sought to interdict the employees from engaging in such acts of assault and intimidation. The High Court held that in order for the Labour Court to have exclusive jurisdiction over the matter, that “there must be a direct relationship between the matter or the dispute before it and a particular relevant aspect and objective of the LRA.” The court went on to state that “[a] mere indirect and incidental one will not suffice.”<sup>91</sup> In the court’s view, the conduct displayed by the employees did not fall into any category connected with a particular objective of the LRA, other than the fact that the employees were engaged in conduct of an unlawful act, subject to the jurisdiction of the High Court.

Zondo JP proceeded to consider a situation where, during the course of a strike, a third party who is affected by the strike, namely by reason of him or her being close to the vicinity of the striking workers, and whether such party can approach either the Labour Court or the High Court for relief. The judge poses the question whether such a party can institute proceedings in the Labour Court despite the absence of an employer-employee relationship or must such a party because of the absence of the employer-employee relationship institute proceedings at the High Court? This problem revealed itself in the *Fourways* matter.<sup>92</sup> The brief facts are that Edgars Stores Limited had leased premises from the Fourways Mall Shopping Center and also at The Avenues Shopping Center. Certain employees of Edgars Stores were members of the South African Commercial Catering and Allied Workers Union (SACCAWU). A wage dispute had arisen between the employees and Edgars Stores. Edgars Stores had, prior to the protected strike

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<sup>90</sup> (2000) 21 ILJ 313(N)

<sup>91</sup> At p. 318B

<sup>92</sup> n. 85 above

obtained an order from the Labour Court interdicting the members of the union from among other things, intimidating and assaulting other employees of Edgars and blocking entrances to Edgars premises in the two areas in which the applicant was leasing premises. At a later stage, the owners of the two shopping properties in which edgars was leasing premises launched an application at the High Court in which they complained that members of the union were engaging in acts of obstructing vehicles coming in and out of the shopping malls, either belonging to the landlords, tenants, customers or members of the public and also inter alia, interdicting the employees from assaulting, intimidating, threatening, harassing and interfering with employees of the landlord or of the other landlords' tenants. The application also sought to interdict the employees from being in a radius of 500 metres from the shopping malls.

The same point that the High Court had no jurisdiction to preside over the matter was raised on behalf of the respondents. Classen J dismissed the point and his reasons were that :

- (a) The nature of the dispute between the applicants and the respondents in the case before him arose out of the law of delict as well as the law of property and that the applicants were seeking to protect their property from unlawful infringement and /or injury by the union's members and to protect their customers and business.
- (b) The applicants has a 'fundamental as well as constitutional right to ply their trade and enjoy their property to the full and that the law will not tolerate the frightening off of customers by labour troubles, reprisals, fear of unpleasantness,etc'
- (c) Under the *actio legis aquialae* an owner of property is granted a remedy in damages against another who has unlawfully interfered with the owners free exercise of full rights of ownership; alternatively, that the owners right would be



protected under the law of nuisance which is a branch of both delictual and property law.<sup>93</sup>

The court therefore was not persuaded that the cause of action in this matter fell within the context of labour law and consequently endorsed the courts jurisdiction to hear the matter. In his analysis of the *Fourways* judgement, Zondo JP, observed that Classen J may have been correct in relying on the fact of the absence of the employer-employee relationship between the property owners and the union members. The judge however mentioned that the very purpose of the Act was to create courts with the requisite knowledge and expertise in labour law.<sup>94</sup> The judge further remarked that s 67(2), (b) and (8) of the LRA would seem to be applicable in the facts of the *Fourways* matter. Section 67 (2) provides that :

“A person does not commit a delict or a breach of contract by taking part in-

- (a) a protected strike or a protected lock-out; or
- (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.”

On the other hand section 67 (8) of the LRA provides that:

“Civil proceedings may not be instituted against any person for-

- (a) participating in a protected strike or protected lock-out; or
- (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.”

In Judge Zondo’s view, the acts of toyi-toying, chanting, demonstrating and the carrying of placards in the vicinity of the employer to whom a strike is directed are part of picketing which is contemplated by s 69 of the LRA. Strikers are also entitled to speak to members of the public to persuade them to support their strike by not having any business

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<sup>93</sup> at p. 1129

<sup>94</sup> at p.1129

dealings with the employer(s) against whom the strike is directed. All these factors according to Zondo JP were not considered by the court in the *Fourways* matter. The judge further noted that an order interdicting strikers from interfering with members of the public may be too vague, “quite apart from the fact that it may have no legal basis when regard is had to the provisions of ss 67 (2), (6) and 69 of the Act.”<sup>95</sup> It is in this regard that the judge proposes some urgent legislative intervention so as to avoid the following problems;

- (a) If there were to be appeals against the judgements of the two courts, namely the judgement of the Labour Court in the *Langevelt* matter, and the judgement of the High Court in the *Fourways* matter, the appeals would have to go to two different court of appeals i.e the Labour Appeal Court and the Supreme Court of Appeal. In the Court’s view in such a scenario the likelihood of conflicting judgements cannot be ruled out, thereby creating an incoherent system of law.
- (b) This could also lead to an unacceptable situation wherein litigants would go on ‘forum shopping’. Thus an employer faced with a ‘trouble some’ union can arrange with the landlord to have the latter approach the High Court for purposes of interdicting the workers from engaging in what may otherwise be a lawful strike.

On the question of the High Court’s powers to adjudicate on contracts of employment under the common law, Judge Zondo in the same case (*Langevelt* matter), felt obliged to share his useful expertise on the subject. It is stated by the judge that-

“in terms of the principles of the law of contract, an employer is entitled to terminate an employee’s contract of employment either on notice or summarily where the employee has committed a material breach of the contract of employment. If the employee believes the dismissal constitutes a repudiation of the contract of employment (eg because he has not committed a material breach of the contract of employment justifying summary dismissal), he may either accept the repudiation which would then bring the contract to an end and claim such damages as he may suffer as a result of such repudiation or he may reject the repudiation and hold the employer to the contract. In this event the employee could also institute action in the High Court for damages for wrongful dismissal. In fact he could even institute action or bring an

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<sup>95</sup> At p. 1130

application in the High Court for specific performance on the basis that the dismissal is unlawful or wrongful. In such a case the employee's complaint about dismissal need not be that the dismissal was unfair. It needs to be that the dismissal was wrongful or unlawful or invalid."<sup>96</sup>

On the basis of the above factual scenario, the Labour Court could still have jurisdiction to hear and dispose of the matter by virtue of s 77 (3) of the Basic Conditions of Employment Act which provides that, "the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract." However in a dissenting judgement in the *Fedlife Assurance* matter<sup>97</sup>, Froneman AJA holds a contrary view to the proposition given by Zondo JP. Froneman AJA stated that one of the primary objects of the Labour Relations Act, 66 of 1995 is to give effect to and regulate the fundamental rights conferred by the Constitution of the Republic of South Africa in s 1(a). Another is to promote the effective resolution of labour disputes. The LRA according to Froneman AJA, must be interpreted to give effect to its primary objects and in compliance with the Constitution. In the words of Froneman, "the Constitution is thus a good place to start any enquiry on the interpretation and application of the Act [LRA]. The Constitution is also a good place to start when one looks at the common-law contract of employment. The general reason for this is that we have only one system of law, and in the final analysis, the constitution always determines the nature and ambit of that law."<sup>98</sup>

It would not be a desirable thing that the High Court should be deprived of its common law jurisdiction to decide on contracts of employment, whatever the nature of such contracts may be. Most importantly, so long as it is accepted that contracts of employment are no different from any other contract, then the High Court should be able to preside over employment contracts in cases of an alleged breach by one party to the transaction. On another note, it is submitted that Labour Court's remedial powers are limited to awarding compensation in accordance with the LRA. There will be those instances where an aggrieved person has a valid delictual claim arising from the unlawful

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<sup>96</sup> At p. 1131 H-J

<sup>97</sup> n. 76, above

<sup>98</sup> at p.2419

repudiation of the contract of employment. In such a case such a person should not be prevented from approaching the High Court so as to seek substantial redress as a result of the breach.

Judge Zondo's ill-feeling about allowing the High Court to adjudicate on labour related matters is that the High Court is not best suited to hear industrial disputes because of lack of specialized skill and knowledge in that area. In the judge's own words, "[i]n that event [event being where the High Court is preferred over the Labour Court in a protected strike scenario], the High Court, not having the advantage of the specialized knowledge, experience and expertise in labour law required by the Act of judges of the Labour Court, may grant an order which completely undermines the process of collective bargaining which is one of the fundamental pillars of the Act."<sup>99</sup> The learned judge may have a point in that regard, but the generally accepted notion is that the High Court's inherent powers presupposes that this court has specialized skill and expertise in all spheres of the law, including the law regulating labour relations.

In the case of a third party or land lord being affected by the consequences of a strike action, such third party or land lord should indeed be able to approach the High Court since in as far as the third party is concerned,, the conduct by the strikers constitute nothing more than a delictual act against him or her. Though the Act protects the strikers from a delictual claim or a civil claim, such protection applies with certain qualifications and limitations. It would be unreasonable to perceive the legislature as having given the striking employees the right to go on a vandalizing spree or assaulting persons, even the party against whom the strike is directed. It is therefore submitted that as long there is sufficient evidence that the employees are engaging in unlawful conduct, for instance, by exceeding the privileges accorded to them to engage in acts of picketing, then the employer or third party should approach the High Court or Labour Court for purposes of interdicting the employees to desist from such conduct.

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<sup>99</sup> At p. 1131

## 9 Jurisdiction of the Labour Court in arbitration awards: where does the buck stop?

Section 145 of the LRA dealing with the review powers of the Labour Court in arbitration awards may appear from a glance to be an uncomplicated provision conferring power upon the Labour Court to review arbitration awards in certain specified circumstances. The volume of literature and decided cases in this area proves the contrary. This section has kept the Labour Court busy as it sought to come up with a comprehensive interpretation of the section. In *Shoprite Checkers (Pty) Ltd v. CCMA & Others*,<sup>100</sup> Pillay D,J made the following remarks as regards s 145;

“whereas the review was intended to be exceptional, it is now fast becoming the norm. This change was brought about somewhat unexpectedly when the new constitution (Act 108 of 1996), which was adopted after the LRA was drafted, was so interpreted by the Labour Appeal Court as to introduce rationality as an additional ground of review. However, the rationality test has become so distorted, that it has blurred the distinction between appeals and reviews.”

The section itself provides that –

“(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the Labour Court for an order setting aside the arbitration award ...

(2) A defect referred to in subsection (1) means –

(a) that the commissioner –

- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
- (ii) committed a gross irregularity in the conduct of the arbitration proceedings;
- (iii) exceeded the commissioners powers

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<sup>100</sup> P.394/2004 (Unreported) at p.6

In seeking to bolster the review powers of the Labour Court, litigants would also seek to rely on s 158 (1) (g) of the LRA which gives the Labour Court more general powers of review than those contained in s 145. However in *Carephone (Pty) Ltd v. Marcus N.O.*,<sup>101</sup> the Court firmly asserted that the powers of the Labour Court to review arbitration awards are limited to those set out in s 145. The review powers of the Labour Court in s158 (1)(g) relate to other issues and have nothing to do with the review of arbitration awards. At this stage, it is perhaps necessary to draw a distinction between appeals and reviews before dealing with the review powers of the Labour Court in arbitration awards.

In *Lekota v First National Bank of SA Limited*,<sup>102</sup> the applicant, who was unrepresented during the hearing, had sought to review an award of the CCMA before the Labour Court on the grounds *inter alia*, that the commissioner accepted false testimony and also that the commissioner was biased during the arbitration proceedings. The court had to decide whether the matter was brought on the correct section of the LRA. It was stated by the Court that the function of the reviewing court is not to decide whether the commissioner acted correctly or whether from the applicants view, the decision by the commissioner was wrong. In other words, in review proceedings, the court does not determine the correctness or otherwise of the decision, nor does it question factual conclusion made by the commissioner. In an appeal however, the appellate court may determine the factual conclusion made by an inferior court and also substitute its decision with a new decision.

In *Frederick's & Others v. MEC for Education & Training, Eastern Cape & Others*,<sup>103</sup> the applicants were teachers employed by the Department of Education in the Eastern Cape. The Department of Education had taken a decision to reduce the number of teachers in that region and, as a result of that decision an agreement was reached between the teachers and the department in terms of which the former were permitted to apply for voluntary severance packages. Initially, the applications for voluntary severance packages were granted by the department. However at a later stage the approval process was altered and many applications were refused. As a result of such refusal, the applicants instituted an application seeking to challenge the refusal at the High Court in

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<sup>101</sup> (1998) 19 *ILJ* 1425 (LAC)

<sup>102</sup> [1998] 10 *BLLR* 1021 (LC)

<sup>103</sup> (2002) 23 *ILJ* 81 (CC)

that the refusal amounted to a breach of their constitutional right to be treated equally as the other employees whose applications were approved.

A point *in limine* had been raised to the effect that the High Court had no jurisdiction to preside over the matter, its jurisdiction having been ousted by s 24 of the LRA dealing with the procedure for resolving disputes relating to collective agreements. This point had been upheld by the High Court whereafter an appeal was lodged to directly to the Constitutional Court. The Constitutional Court observed that s 24 of the LRA required that if there was a dispute with regards to a collective agreement, the dispute should, in accordance with the LRA be first conciliated, and if unresolved referred to arbitration. A party not satisfied with outcome of the arbitration award could then have recourse before the Labour Court by way of review. However in the words of O'Regan J, "a power of review is not a power to determine a dispute. It is a power to correct irregularities in a previous process."<sup>104</sup> Conversely put, the Labour Court cannot, through the process of review, adjudicate a constitutional matter for first time since the CCMA is not a court of law and therefore cannot decide on a constitutional matter. The statement by O'Regan J is simply to say that s 24 cannot oust the jurisdiction of the High Court to hear a constitutional matter since the High Court is a court of a similar status to the Labour Court, as opposed to the CCMA.

In practice, the line of demarcation between appeals and reviews is very thin especially as regards the requirement that decisions of public officials must be rational. In determining whether a decision by a commissioner is, for instance, fraught with a 'gross irregularity', the court must, to a certain extent venture into the merits of the matter. To avoid this problem, it was stated in the *Carephone* case that, "as long as the judge determining the issue is aware that he or she is entering the merits not in order to substitute his/her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."<sup>105</sup>

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<sup>104</sup> At p. 83

<sup>105</sup> At p.1431

In *Kwa-Zulu Transport (Pty) Ltd. & Others v. Mnguni & Others*,<sup>106</sup> the question arose whether section 145 and section 158 (1)(g) of the LRA should apply in reviews made during the actual conduct of the arbitration proceedings or outside the process of arbitration. The applicant had brought an application against a commissioner's decision in which it was alleged that the commissioner had unreasonably declined to recuse himself in arbitration proceedings despite the likelihood of him being biased in the process. The allegation against the commissioner emanated from the fact that he had previously represented employees of the applicant against the applicant company. The first respondent, who was then a shop steward and now the complainant, was the person referring the instructions to the commissioner. The question of the labour court's power of review under s145 of the LRA again came under scrutiny.

The court reiterated that s 145 allows three grounds for review namely, misconduct in relation to the duties of the commissioner, gross irregularity in the conduct of arbitration proceedings, and where the commissioner had exceeded his powers. In the court's view, it would be absurd to hold that only the second ground, namely, that of gross irregularity in the conduct of proceedings, should suffice in reviews of this nature. In the final result, the court was of the view that because of the commissioners' past dealings with the applicant, that the likelihood of him being seen to be leaning in favour of the employee could not be ruled out. Accordingly the commissioner should have recused himself in the matter.

The trend brought about by the number of cases taken to the Labour Court by way of review could be an indication that some steps need to be taken in order to improve the effectiveness of the South African model of labour dispute resolution system. It is submitted that the level of cases going to the Labour Court on review show that the conciliation and arbitration method needs to be improved either in its substantive content of resolving disputes, namely the application of policies and rules by the CCMA or that it needs to improve its manner of resolving disputes, the latter dealing with the question of how the policies and rules are applied. It is further submitted that the problems can be minimized by the CCMA engaging in extensive educational campaigns at the work place

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<sup>106</sup> (2001) 22 ILJ 1646 (LC)



level so that the stakeholders can develop a sense of identity with this body, as opposed to a situation whereby people would hear of this body when there is a dispute; alternatively that it is only when people have problems that they begin to familiarize themselves with the operations of the CCMA in resolving their disputes.

It is submitted that generally, when there is a dispute, namely in the case of an unfair dismissal, the employer will have decided that the relationship has ‘irretrievably broken’ down, given the fact that dismissal is a worst kind of sanction that the employer can impose, equated to capital punishment if one was dealing with criminal law. The employee on the other hand, would probably be in a state of shock, anger or perhaps confusion at the decision taken by the employer to dismiss him or her. Both parties in such a situation are incapable of forming a rational and objective assessment of the other’s action. The employer believes that the dismissal was fair whilst the employee thinks otherwise. Just like in a case of an irretrievable breakdown of marriage, a person best suited to advise the parties and attempt to resolve their differences is a marriage counselor, this being so because the parties identify with the role of this person in attempting to resolve the problems and also because such a person, so it is believed is capable of resolving the differences.

In conclusion therefore, it is submitted that the CCMA may have the capacity to resolve the disputes, but to achieve maximum results, this body should perhaps free itself from being perceived as a body operating ‘in the shadow of the law.’

## **10. The Nature of the jurisdiction of the Industrial Court of Swaziland**

Section 6 (1) of the Industrial Relations Act ( hereinafter referred to as “the IRA”)<sup>107</sup> creates the Industrial Court of Swaziland by providing that the Industrial Court is hereby

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<sup>107</sup> no. 1 of 2000

established with all the powers and rights set out in this Act or any other law, for the furtherance, securing and maintenance of good industrial or labour relations and employment conditions in Swaziland. The purpose and objectives of the IRA are said to be *inter alia* , to promote harmonious industrial relations,<sup>108</sup> to promote freedom of association and expression in labour relations,<sup>109</sup> to provide mechanisms and procedures for the speedy resolution of conflicts in labour relations,<sup>110</sup> to stimulate economic growth<sup>111</sup> and to ensure adherence to international labour standards.<sup>112</sup>

The IRA applies in the employment context in the same way as it applies to government in its capacity as employer but does not apply to the following categories of persons:<sup>113</sup>

- (a) any person serving the Umtsofo Swaziland Defence Force established by the Umtsofo Swaziland Defence Order, 1977
- (b) The Royal Swaziland Police Force
- (c) His Majesty's Correctional Services established by the Prison Act no 40 of 1964.

In section 8 (1), it is provided that “the Court shall, subject to sections 17 and 65, have *exclusive jurisdiction* [my emphasis] to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer's association and a trade union, or staff association or between an employee's association, a trade union, a staff association, a federation and a member thereof.”

In subsection (3), the Industrial Court is given powers which are similar to those of the High Court, including the power to grant an injunctive relief. As is the position in the

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<sup>108</sup> S 4 (1) (a)

<sup>109</sup> S 4 (1) (c)

<sup>110</sup> S 4 (1) (d)

<sup>111</sup> S 4 (1) (h)

<sup>112</sup> S 4 (1) (i)

<sup>113</sup> S 3

case of the LRA in South Africa, the IRA applies only in the employment context as between employer and employee or their respective organizations. In the definition section of the IRA, an employee is defined as “a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or any other arrangement involving control by, or sustained dependence for the provisions of work upon , another person.” This definition, no doubt favours the common law definition of the contract of employment. Contrary to the problems often associated with the South African labour law dispensation on whether or not the common law contract of employment has been substituted by the LRA, the Swaziland definition reaffirms and recognizes the existence of the contract of employment under the common law.

The Employment Act<sup>114</sup> on the other hand, which regulates the individual contract of employment in detail, is not comprehensive in its definition of who is an employee. In section 2 of this Act, it is provided that an employee means “any person to whom wages are paid or are payable under a contract of employment” Wages are defined in the Act as meaning remuneration or earnings including allowances, however designated or calculated capable of being expressed in terms of money and fixed by mutual agreement or by law which are payable by an employer to an employee for work done or to be done under a contract of employment or for services rendered or to be rendered under such a contract. There are two important things that come out of the definition of wages and the definition of employee in terms of the Act.

Though both the IRA and the Employment Act provide a limited scope of who is an employee, however all the factors considered by the Labour Court and the presumptions set out in the legislations in South Africa on the question of who is an employee applies with equal force in Swaziland by virtue of the express recognition of the common law contract of employment by these legislations. Secondly, the definition of wages in the Employment Act is comprehensive enough to resolve the question as to the exact commencement of the contract of employment. In the South African context, until

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<sup>114</sup> no. 5 of 1980

recently<sup>115</sup>, a debate had arisen as to when a person should be regarded as an employee. Is it when a contract of employment has been concluded? or must the person have rendered a service so as to be entitled to remuneration that we can properly speak of an employee? In the *Wyeth* case, for instance, a written contract of employment had been concluded by and between the parties. The contract was to become operative in a future date. The company had advised the 'employee' to look for a new car pursuant to the party's agreement. The 'employee' got a second-hand car but represented to the company that he had found a new car. The company was not pleased by the misrepresentation and terminated the contract of employment before the 'employee' had started working for it. At the CCMA, the company raised a point *in limine* that the CCMA had no jurisdiction over the matter because there was no employer-employee relationship between the parties, as the latter had not yet commenced on his duties. After lengthy deliberations, the Labour Court of Appeal held that respondent was an employee within the meaning of the LRA. It is submitted that this aspect was well taken care of by the legislature in Swaziland by specifically providing that a person is an employee even if wages are payable in a future date.

## **11. The review powers of the Industrial Court of Swaziland**

There is no provision in IRA granting the Industrial Court review powers of any nature. In section 8 (3) of the IRA, it is provided that "in the discharge of its functions *under this Act* [my emphasis], the Court shall have all the powers of the High Court, including the power to grant injunctive relief." The High Court has inherent powers of review under the common law and also in accordance with Rule 53 of the Rules of the High Court. The functions of the Industrial Court are to be found in section 8(1) of the IRA amongst which is the power to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any provisions of the labour laws. In South Africa, the Courts have firmly stated that the performance of a function by the Labour Court under the Act can mean no more than those functions specifically assigned

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<sup>115</sup> See the case of *Wyeth (SA) (Pty) Ltd v. Thulani Manqele & Others*

to the Labour Court by the LRA and nothing more.<sup>116</sup> The same can be said of the Industrial Court of Swaziland. The Industrial Court cannot exercise review powers which are exercised by the High Court either at common law or in accordance with Rule 53 in the absence of an express provision in the IRA giving the Court such powers.

The status of the Industrial Court is reduced to be similar to that of an arbitration body in section 17, where it is provided that in hearing and determining any dispute, an arbitrator shall have all the remedial powers of the Court [Industrial Court] referred to in section 16. A converse way of putting this statement is to say that arbitration awards in the context of the IRA have the same equal value as judgements of the Industrial Court in those matters falling within the scope of these two processes. This effectively means that the Industrial Court cannot review decisions of the Conciliation, Mediation and Arbitration Commission. This, no doubt, is an undesirable and unintended consequence flowing from the IRA. In a situation where a point of law is taken to the effect that either one of the parties is not an employee or an employer or in a case where the Conciliation, Mediation and Arbitration Commission is either failing to perform its functions or not properly performing its functions, this means recourse can only vest with the High Court. Again the question arises as to whether the High Court would have jurisdiction over such a matter since the matter would have arisen in the context of employment. In a situation where for instance, the commission's power to preside over the conciliation process is questioned on account of a doubt as to whether or not a person is an employee, where would review lie in such a case; Industrial Court or High Court ?

Though section 8 (3) purports to confer upon the Industrial Court a status similar to that of the High Court, however such a status is reduced to almost nil by section 19(5) of the IRA where it is provided "a decision or order of the court [Industrial Court] or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law." The Industrial Court therefore is, no doubt an inferior court as compared to the High Court. In *Josephine Gwebu v. Power Factory Shop*

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<sup>116</sup> See, for instance, the case of *Shoprite Checkers (Pty) Ltd v. Ramdwan NO & Others* (2001) 22 ILJ 1603 (LAC)

& the Chairman of the Workmen's Compensation Board<sup>117</sup> an application was brought to the Industrial Court seeking an order *inter alia*:

- (a) Directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay to the applicant her workmen's compensation in terms of the final medical certificate
- (b) Setting aside the workmen's compensation medical Board Report

The applicant in this matter had fallen on some steps at the 1<sup>st</sup> respondent's premises where she was working. A medical practitioner had examined her and issued a medical certificate to the effect that applicant had sustained a permanent disablement and a 25% loss of her earning capacity. The 1<sup>st</sup> respondent (employer) was not happy with the assessment and applied to the Commissioner of Labour for a fresh assessment of applicant's injuries. The Commissioner of Labour in turn referred the matter to the Workmen's Compensation Medical Board which latter body made an assessment of applicant's injuries and concluded that the applicant had sustained a 0% loss of earning capacity. It was this conclusion that applicant sought to challenge by way of review before the Industrial Court. It was argued on behalf of the applicant that the board's assessment of the applicant was irregular in that it was made after the lapse of 21 days contrary to the provisions of section 14 (1) of the Workmen's Compensation Act.<sup>118</sup>

In a brief judgement dismissing the application, the court said the following:

"the matter before Court is not an appeal as envisaged by section 14 (4) of the Act [Workmen's Compensation Act]. Even if it were an appeal, still this court would not have jurisdiction to entertain it because disputes concerning the assessment of incapacity or disablement which falls to be dealt with under section 32 are expressly excluded from those matters that may be brought to this court on appeal. The result is that this court will come to the conclusion that it has no jurisdiction to entertain the matter in view of section 32(2) of the Act."

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<sup>117</sup> Case no. 408/ 2004 (unreported)

<sup>118</sup> Act no.7 of 1983

## 12. The Industrial Court's powers to exclusively hear labour disputes encroached

The Industrial Court was first established by the Industrial Relations Act no.4 of 1980. This legislation was repealed by the Industrial Relations Act no.1 of 1996 which in turn was super-ceded by the present Industrial Relations Act, no.1 of 2000. The jurisdiction of the Industrial Court under the 1980 IRA was set out in section 5(1) of that Act in which it was provided that “the Court shall have exclusive jurisdiction in every matter properly before it under this Act, including jurisdiction –

(a) to hear and determine trade disputes and grievances...”

The provisions of the above section were deliberated by the Industrial Court in the case of *Pan Attendants v. Ubombo Ranches*.<sup>119</sup> This was an application brought against the respondent company seeking an order directing the respondent to upgrade the applicants to the position of Pan Boilers. A preliminary objection was raised on behalf of the respondent in which it was argued that the Industrial Court had no jurisdiction to grant the relief sought by the applicants. The Court was however not convinced by the preliminary objection as regards the jurisdiction of the Industrial Court to hear the matter. Hassanali JA ruled that the section [section 5(1)] confers upon the Industrial Court the widest possible powers to be exercised in the determination of labour disputes. The question, so the judge stated, was whether the issue of upgrading or promotion can be classified as a trade dispute. The court answered the question in the affirmative because to hold otherwise would create an inconvenience and hardship to a seeking redress, contrary to the apparent intention of the legislature and that this would render section 2 read with section 5 an absurdity.

In finding support for the above conclusion, the court referred to the title of the legislation because in the court's view, “the title of an Act is certainly part of the Act

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<sup>119</sup> Case no.3 of 1990 (unreported)

itself and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope.”<sup>120</sup> The court observed the Act was enacted in order to provide for the collective negotiations of terms and conditions of employment and for the establishment of an Industrial Court for the settlement of disputes arising out of employment.<sup>121</sup> The Industrial Court was therefore established to settle all disputes arising out of employment. The matter was consequently concluded by a ruling that an application for the upgrading or promotion of an employee is a dispute properly falling within the scope of employment and therefore within the jurisdiction of the Industrial Court.

On the question of whether section 5(1) of the Act ousted the jurisdiction of the High Court to hear and determine contracts of employment under the common law, the High Court had to decide the issue in *Donald Mills-Odoi v. Elmond Computer Systems (Pty) Ltd.*<sup>122</sup> This was an application for summary judgement before the High Court in which the Plaintiff was claiming the following relief:

- (a) Payment of the sum of E 7 026. 25 being in respect of arrear salary for February and March 1987 and accrued gratuity in terms of the Plaintiff's employment contract with the defendant.
- (b) Interest a *tempore morae* at the rate of 9% per annum.
- (c) Costs of suit.

A point *in limine* was raised on the defendant's affidavit resisting summary judgement in which it was averred that the High Court “has no jurisdiction to hear this matter due to the provisions of section 5 of the Industrial Relations Act 1980 which give the Industrial Court exclusive jurisdiction to hear and determine disputes and claims as set out in the Plaintiff's Particulars of Claim.” Dunn AJ, examined the provisions of section 2 and 5(1) of the Industrial Relations Act and made the observation that section 2 of the Act defines

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<sup>120</sup> At p.3

<sup>121</sup> At p. 3

<sup>122</sup> Civil case no.44/1987 (unreported)



a dispute to include a grievance, a trade dispute and means any dispute in respect of the following the issues :

- (a) The entitlement of any person or group of persons to any benefit under an existing collective agreement.
- (b) the existence or non existence of a collective agreement or works council agreement.
- (c) The dismissal, employment suspension from employment, re-employment or re instatement of any person or group of persons;
- (d) The recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment;
- (e) The application or the interpretation of any law relating to employment; or
- (f) The terms and conditions of any employee or the physical conditions under which such employee may be required to work.

The defendant's argument was that the issue between the parties was a dispute under paragraph (f) above. The court first looked at the principle of interpretation of statutes and held that it is trite law that in order for the legislature to oust the jurisdiction of a court of law, that it must do so clearly and unambiguously. In this regard the court referred to the South African cases of *De Wet v. Deetlefs*<sup>123</sup> and the case of *R v. Pardsha*.<sup>124</sup> On the proper interpretation of section 5(1) the court made the following remarks :

“section 5(1) of the Act limits the jurisdiction which is conferred on the Industrial Court to matters *which are properly before that court* [my emphasis]. To determine whether or not a matter is properly before the Industrial Court one has to look to what is termed the “Disputes Procedure” under Part VII of the Act, the relevant sections under this part

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<sup>123</sup> 1928 AD 286 at 290

<sup>124</sup> 1923 AD 281

being sections 50 through to 58...It is clear from the sections I have referred to under Part VII of the Act that the Industrial Court should be utilized as a last resort in the determination of a dispute. A person who desires to have a dispute resolved under the Act must utilize the machinery provided for under Part VII and cannot in my view report or refer a dispute direct to the Industrial Court. In my view, therefore, a matter can only be said to be properly before the Court [Industrial Court] if it has been referred to such court under section 53, 58 or 60.”<sup>125</sup>The Court then considered whether a party to an industrial dispute is obliged to utilize the machinery provided for in the Act. In the Court’s view, the use of the word “may” through out the provisions of the Act gave an indication that these sections do not make it compulsory for persons or organizations to utilize the dispute resolution machinery provided in Chapter VII of the Act. The judge concluded the matter by making the following statement:

“ The section [5(1)] simply provides for a simpler and obviously less costly machinery for the settlement of disputes arising out of employment. It is open to a party to a dispute to have such dispute resolved either under the common law or in terms of the disputes procedure provided for under the Act. Should a person elect to have a dispute settled in terms of the Act and to have the matter referred to the Industrial Court, then only does the matter fall within the exclusive jurisdiction of the Industrial Court.”<sup>126</sup>

In the final result, the conclusion made by the Court is that there was nothing in the papers filed of record which gave the indication that the plaintiff’s claim was a matter ‘properly before the Industrial Court’ and held that the plaintiff had elected to pursue his claim for breach of his employment contract at the High Court and not in terms of the Industrial Relations ACT, 1980. The point *in limine* was thus dismissed with costs.

In *Sibongile Nxumalo & Others v. The Attorney General & Others*,<sup>127</sup> the Appeal Court had to decide the problem of the High Court’s powers to adjudicate labour disputes. The High Court, in a judgement delivered by the then Chief Justice Stanley Sapire, had dismissed the application by the teachers on the ground that the High Court has no

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<sup>125</sup> At pp 4-5

<sup>126</sup> At p. 6

<sup>127</sup> Appeal Court Case no. 25/1996 (unreported)

jurisdiction to decide over the matter by virtue of section 5(1) of the Industrial Relations Act, 1980, which gave the Industrial Court “exclusive jurisdiction” to hear labour matters. The appellants in this case were all school teachers employed by the Swaziland Government in various regions of the country. What had happened is that pursuant to a mass meeting called by the Swaziland Association of Teachers (SNAT) held on the 6<sup>th</sup> June 1996, a resolution had been taken by the teachers to engage in a “sit-in” strike which was to commence the following day. In terms of this resolution, teachers were to go school but refrain from teaching. The Minister for education had, pursuant to the resolution, issued announcements over the media that parents were to keep their children at home until the dispute between the government and the teachers was resolved. The sit-in strike lasted from 14 June 1996 to 10 July 1996. The government, through the Minister for Education, took a decision that it would apply the “no work, no pay” rule to all teachers who did not perform their duties during the period of strike. Indeed the government applied the rule and among those affected were the applicants.

The applicants denied that they were at fault and argued that they were ready to teach but that there were no children to teach as a result of the Minister’s announcement that children should stay at home. They thus applied to the High Court for an order directing the government to refund the monies deducted from their salaries. In dismissing the teachers application, the High Court had ruled that “the creation of an Industrial court, the definition of its jurisdiction as to the subject matter, and the use of the word “exclusive” in section 5(1) are indications giving rise to an inescapable inference that the legislature intended to establish a special court which alone, to the exclusion of all other courts would deal with what may loosely be referred to as “labour matters,” inelegantly defined in the section where labour law would be applied. Broadly speaking, labour law is to be understood as the common law of master and servant as expanded and otherwise modified by industrial legislation.” The judge had then proceeded to state that “in the context of the Act as whole the adjectival phrase can only refer to those cases, which, having regard to their jurisdictional facts, involve issues governed by labour law as defined in the section itself and which fall within the ambit of those matters reserved for

decision by the Industrial Court. In such cases the Industrial Court alone has jurisdiction.”<sup>128</sup>

The Appeal Court was however not convinced by the High Court’s proposition of the law in this area. The Appeal’s Court judgement, which was delivered by Tebbut JA, reiterated the principle that there is a strong presumption against legislative interference with the jurisdiction of the ordinary courts and that this was so not only in the courts of Southern Africa but also in courts in other parts of the world.<sup>129</sup> This presumption, so the Appeal Court held, applies with equal force in Swaziland and most importantly, that this presumption will apply where the unlimited jurisdiction of the High Court is enshrined as part of the supreme law of the country, as in Swaziland.<sup>130</sup> The Appeal Court quoted the case of the *Federal Commissioner of Taxation v. Munro*<sup>131</sup> where it was said that “there is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds; if the language of a statute is not intractable as to be incapable of being consistent with this presumption, the presumption should prevail.”

In order to arrive at the true intention of Parliament, one must have regard to the Act as a whole and not just to a particular section of it and also that it is permissible to look at the purpose and object of the legislature when passing the Act in question.<sup>132</sup> The Appeal Court went on to stipulate that the purpose of the Industrial Relations Act was that the Industrial Court should adjudicate only those disputes set out in the definition of the Act, viz disputes relating to employer-employee organizations, agreements, terms and conditions of employment, issues relating to disciplining, suspension, dismissal, and subsequent re-instatement or re-employment of an employee. That this was the intention of Parliament appears from the provisions of the 1980 Act which conferred exclusive jurisdiction upon the Industrial Court “in every matter properly before it *under the Act*.”<sup>133</sup> Accordingly only those matters reserved to the Industrial Court in terms of Parts IV, V, VI and VII and brought before the Court in terms of those sections can be said to

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<sup>128</sup> quoted at p.5 of the *Nxumalo* judgement

<sup>129</sup> At p. 6

<sup>130</sup> At p. 7

<sup>131</sup> 38 (Commonwealth Law Reports) at p.180 quoted at p.7 of the *Nxumalo* judgement

<sup>132</sup> *Nxumalo* case, at p. 7

<sup>133</sup> Per Tebbut JA in the *Nxumalo* matter, at p.7

be properly before the Industrial Court under the Act. In upholding the appeal by the applicants, the Appeal Court said that “the present claims by the appellants [applicants] are ordinary common law claims by an employee against an employer for payment of wages allegedly unlawfully withheld from him/her. The reason for the employer having done so may flow from a strike but that does not bring the matters within the jurisdiction of the Industrial Court or make them ones “properly before the latter court.”<sup>134</sup>

The Appeal Court judgement thus re-affirms in all material respects the judgement given by Dunn AJ in the Donald-Mills case. It is also to be noted that the subsequent legislations, namely the 1996 IRA and also the 2000 Act did not alter this positions by bringing in differently worded clauses on the jurisdiction of the Industrial Court.

### 13. Conclusion

From a practical point of view, Swaziland needs to overhaul her labour market regulatory systems to meet the particular needs of the population. This requirement should involve a thorough examination of all the structures that tend to influence the labour environment. A key area that needs to be looked at is the relationship between the traditional structures of government as well as the modern government.

The problems in Swaziland are not just limited to the labour atmosphere but extend to the adoption and application of democratic principles by the rulers of the country. In recent years, Swaziland’s economy has tended to rely heavily on the textile industry. The constant closures of the textile industries, coupled with the constant AGOA threat has put Swaziland under international scrutiny, requiring the country to take urgent steps to correct her internal policies across the board.

On the other hand, the idea of borrowing a labour regulatory system by Swaziland from South Africa has, relatively speaking, produced positive results for Swaziland. The recent amendments to the IRA which will see matters going straight to arbitration in a case of non-appearance by one of the parties to the dispute during conciliation, will, hopefully ease the backlog of cases pending determination by the Industrial Court. However it is

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<sup>134</sup> At p.7-8

noted that this amendment was merely effected in order to encourage the parties to attend conciliation. What now remains a matter of concern is; having encouraged the parties to attend conciliation, what will then happen in those instances where the parties attend conciliation and a certificate of unresolved dispute is issued by the commissioner?

Perhaps it would have been desirable for the legislature in Swaziland to consider a full scale arbitration method after conciliation, whether or not both parties are in attendance during conciliation. This suggestion emanates from the fact that the history of events in Swaziland shows that there will always be problems in the appointment of judges of the industrial court.

It is further submitted that the Industrial Court in Swaziland should have been given review powers to test the validity of decisions made by the Conciliation, Mediation and Arbitration Commission. The suggestion is made in light of the fact that the commission has been given powers to proceed by way of arbitration in those instances where one of the parties fails to show up during conciliation. The lack of review powers means that a discontented party would have to proceed to the High Court in order to have decisions of the commission considered by way of review. This position is not ideal and goes against the purpose and objects of the IRA as regards the settlement of labour disputes through a less-costly and quick procedure.

In the case of South Africa, it is submitted that what the tripartite forum needs to look at is the idea of deregulating the labour market. The informal or small businesses need to be relieved from the heavy requirements of the various labour legislations. With the present status quo, it is hard to identify South Africa with the notion of freedom of economic activity provided for in the Constitution of the country.

On the other hand, the issue of the competing jurisdiction between the Labour Court and the High Court can easily be sorted out by coming out clear in terms of legislation as to the dividing line between this controversial issue.

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